United States Court of Appeals for the Second Circuit



APPELLANT'S BRIEF

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77-1150

United States Court of Appeals

For the Second Circuit

UNITED STATES OF AMERICA,

Appellee,

against

AMREP CORPORATION, RIO RANCHO ESTATES, INCORPORATED, ATC REALTY CORPORATION, HOWARD W. FRIEDMAN, CHESTER CARITY, HENRY L. HOFFMAN, DANIEL FRIEDMAN,

Defendants-Appellants.

Appeal from Judgments of the United States District Court for the Southern District of New York

JOINT BRIEF FOR DEFENDANTS-APPELLANTS AMREP CORPORATION, RIO RANCHO ESTATES, INCORPORATED, ATC REALTY CORPORATION, HOWARD W. FRIEDMAN, and HENRY L. HOFFMAN

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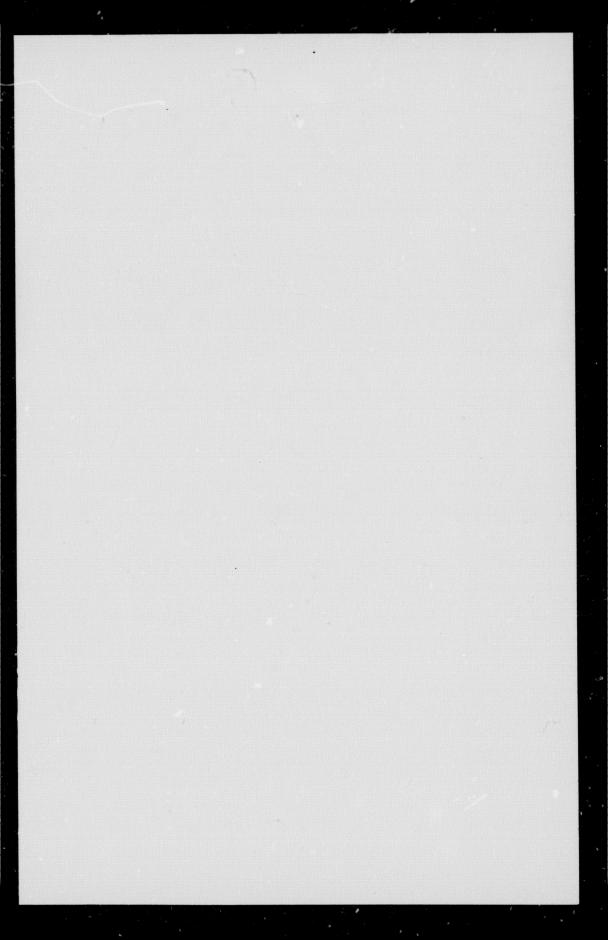
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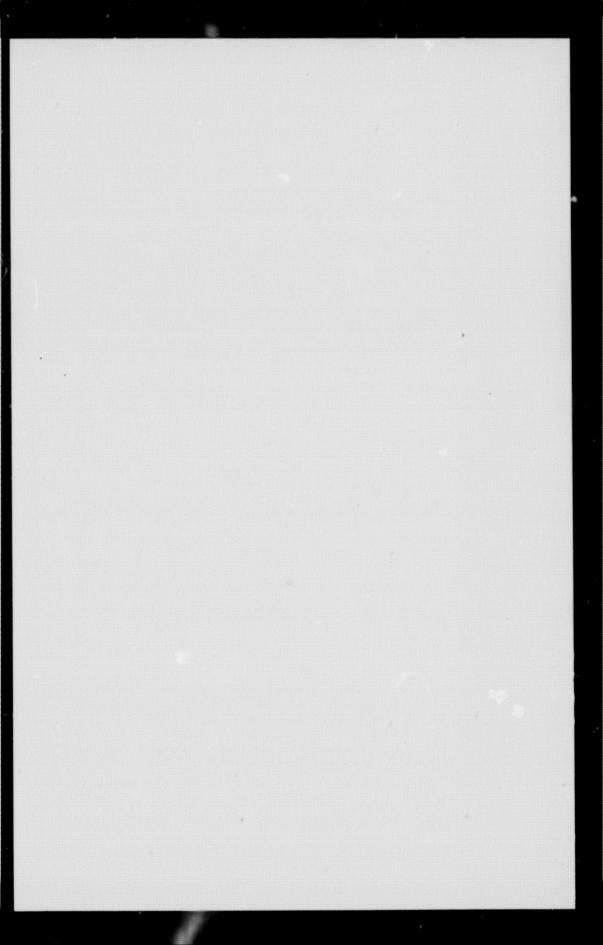
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Questions Presented

1. Where a principal defense of appellants was that they believed in good faith that their advertising representations had been approved as lawful by regulatory agencies which reviewed all advertising prior to use for form,



language and content and permitted its use upon a finding that it contained no false representations, did the trial court commit reversible error by prohibiting appellants from arguing this defense to the jury, by enjoining appellants from quoting to the jury highly relevant trial testimony directly bearing on this defense, by refusing to instruct the jury on this defense as requested, and instead by instructing the jury in such a way as to eliminate the defense from consideration?

- 2. Where appellants' fraud convictions are based upon the claim that two of their opinions about Rio Rancho were false, was the evidence insufficient as a matter of law to sustain the convictions when (a) the evidence established that appellants were justified in their opinions; (b) there was no evidence that appellants did not honestly believe in the accuracy of their opinions; and (c) the representations of opinion were subject to more than one meaning and there was no evidence as to which meaning appellants intended?
- 3. Does appellants' use of the phrase "only" in representing their opinion that Albuquerque's growth would occur "only" to the northwest, and the adjective "good" in representing their belief that the purchase of Rio Rancho lots was a "good" investment amount to criminal fraud within the meaning of the Mail Fraud Statute and Interstate Land Sales Full Disclosure Act?
- 4. Did the trial court err in admitting into evidence (a) two inflammatory tape recordings when there was insufficient proof as to either their authenticity or chain of custody; (b) nine prejudicial documents containing hearsay declarations when the documents were authored by persons

who were neither called as witnesses nor employed by any of the corporations; and (c) prejudicial hearsay statements of non-testifying corporate employees against the individual appellants?

- 5. May appellants' convictions on counts 67, 71, 72, 73, 75 and 79 stand where the only evidence necessary to finding an essential element of the offenses charged in those counts was admitted into evidence outside the presence of the jury, never exhibited to the jury in the courtroom and never requested by the jury during its deliberations?
- 6. May appellants' mail fraud convictions on counts 7, 10, 21, 22, 23, 28, 29, 35, 36, 44, 61, 64 and 67 stand where there was no evidence that the "mailings" alleged in those counts had been sent through the United States mails?

Statement Pursuant to Rule 28(3), Federal Rules of Appellate Procedure

This is an appeal from judgments of the United States District Court for the Southern District of New York (Metzner, J.) rendered on March 10, 1977, convicting appellants, Howard W. Friedman, Daniel Friedman, Henry L. Hoffman, Chester Carity, AMREP Corporation, RIO RANCHO ESTATES, Incorporated, and ATC REALTY Corporation, of 20 counts of Mail Fraud (Title 18, United States Code, Section 1341) and five counts of violating the Interstate Land Sales Full Disclosure Act (Title 15, United States Code, Section 1703[a]).

The presentation of and responsibility for this appeal has been divided between our firm, Stanley S. Arkin, P.C.,

and Curtis Mallet-Prevost & Mosle. This brief is submitted on behalf of Howard W. Friedman, Henry L. Hoffman, AMREP Corp., RIO RANCHO ESTATES, Inc., and ATC REALTY Corp. We adopt and join in the points raised on behalf of Chester Carity and Daniel Friedman.

The indictment (A 10-A 36)* charged appellants, together with three others, Solomon H. Friend, Irving Blum, and Herman Oberman, with mail fraud and interstate land sales fraud in connection with their development of a community and sale of lots at Rio Rancho Estates, a subdivision $4\frac{1}{2}$ miles northwest of Albuquerque, New Mexico. Specifically, the charge was that appellants and the three others misrepresented Rio Rancho by stating or permitting to be stated the two opinions that (a) the direction of Albuquerque's growth would be only to the northwest, and (b) the purchase of lots in Rio Rancho was a good investment.

Trial commenced on November 3, 1976 before the Honorable Charles M. Metzner and a jury. At the conclusion of the prosecution's case, judgments of acquittal were entered as to Solomon H. Friend, Irving Blum and Herman Oberman. On January 24, 1977, appellants were found guilty on 20 mail fraud counts and 5 interstate land sales fraud counts.**

On March 10, 1977, each individual appellant was sentenced to a concurrent six-month term of imprisonment on

^{*} References in parentheses preceded by "A" are to pages of appellants' appendix.

^{**} Although the indictment contained 80 counts—70 mail fraud counts and 10 interstate land sales fraud counts—Judge Metzner ruled prior to trial that the prosecution would be permitted to present only 20 mail fraud counts. In addition, 5 of the 10 interstate land sales fraud counts were dismissed after the prosecution's case.

each count (A 8395). AMREP Corp. was sentenced to pay a fine of \$1,000 on each of the 20 mail fraud counts and a fine of \$5,000 on each of the 5 interstate land sales fraud counts (A 8395). The other corporations were not fined (A 8395).

Execution of the sentence of imprisonment has been stayed pending appeal (A 8396) and, with the prosecution's consent, the fines have been paid into an escrow account.

Notices of appeal from the judgments of conviction were timely served and filed on March 18, 1977.

Introduction

Since 1961, appellants have been engaged in the business of selling subdivided land and developing a community now consisting of close to 7,000 persons at Rio Rancho Estates, a suburb of Albuquerque, New Mexico. Unlike others, including substantial public companies in the closely regulated and controlled land development industry, AMREP never defaulted on any of its obligations to its customers and has succeeded in establishing a flourishing, progressively growing community which abuts one of the most rapidly expanding population and industrial centers in the southwest.

Initially contained in a 42-page prolix, incoherent and rambling indictment characterized by the trial court as "both a press release and an indictment" (Tr. June 22, 1976, p. 38)* and then in a marginally less confusing super-

^{*} References in parentheses preceded by "Tr." are to pages of the stenographic transcript of the trial court proceedings all of which have been docketed as part of the record on appeal.

seding indictment, the charge was that Rio Rancho lots had been sold by appellants for over 15 years by means of false representations. Appellants' entire business practice, their selling methods, even safeguards they implemented which would have had no purpose other than to protect customers, were charged to be part of the alleged scheme.

Indeed, the very existence of a growing and successful community at Rio Rancho was claimed by the prosecution to be a "false impression" (see indictment, S 76 Cr. 644, para. 14, A 14) and argued by it to be a "showcase" (A 191) designed to deceive customers into believing that appellants were gradually developing Rio Rancho.

The evidence established beyond any question that due to appellants' multimillion dollar investment, Rio Rancho has been and is a growing, viable and prospering community in which close to 7,000 people now live. Hardly the desert wasteland the indictment charged and the prosecution sought to portray, Rio Rancho, situated 4½ miles northwest of Albuquerque, New Mexico, contains over 2,000 homes, a shopping center, an office building, a movie theater, several banks and restaurants, a medical center, schools, churches, recreational facilities and an industrial park. Every witness was compelled to agree that Rio Rancho is a successful and growing community.

The prosecution's omnibus challenge to the bona fides of appellants' intention to develop Rio Rancho did not survive the trial at which the uncontradicted evidence, presented by both prosecution and defense witnesses, demonstrated appellants' extensive planning, multimillion dollar investment and the obvious success of the community. As

a result, the prosecution's case against appellants was reduced to the claim that two expressions of opinion were false. The opinions, reflective of appellants' belief in the worth of their product, were that Albuquerque's future growth would be only to the northwest, in the direction of Rio Rancho, and that the purchase of land in Rio Rancho was a good investment. The evidence failed absolutely to establish that these opinions were not honestly entertained by appellants, and the proof was there was sound and ample justification for appellants to hold these opinions. Indeed, there was not an iota of evidence that appellants doubted the accuracy of their opinions and predictions. We submit that this failure of proof requires a reversal and a dismissal of the indictment (see Point II, infra).

The indictment and the ensuing convictions are particularly unjust because they represent the government's single charge of criminality in an entire industry where representations of opinion just like the ones at issue here have continuously been made industry-wide. Significantly, these representations have been repeatedly countenanced by federal and state regulatory agencies charged by law with monitoring the interstate sale of subdivided land. Despite evidence of the extensive and encompassing "watchdog" role of New York's Department of State over appellants' business, including the review and approval of all advertising prior to use, the trial court stymied appellants' defense that they lacked an intent to defraud because they believed in good faith that official review and permission to use advertising constituted an approval that the advertising was lawful. The withdrawal of this crucial defense by the trial court's limitation on argument, refusal to charge the jury as requested, and charging the jury as it did, requires a reversal and new trial (see Point I, infra).

Certain evidentiary rulings also require reversal. Rank hearsay was frequently admitted at the trial and eight-year-old tape recordings, calculated more to inflame than prove anything of significance, were admitted without proof of either authenticity or chain of custody for them (see Point III, infra). Additionally, certain evidence admitted outside the presence of the jury and never viewed by it, was essential for conviction on certain counts. As the jury could not possibly have considered this evidence, the convictions on those counts must be reversed (see Point IV, infra).

Statement of Facts

Rio Rancho Estates-The Allegedly Fraudulent Product

Rio Rancho Estates is a 91,000 acre subdivision 4½ miles northwest of Albuquerque, New Mexico. The southern-nost 55,000 acres were purchased by appellants in 1961 with the remainder purchased between 1969 and 1971 (Exhibit CK—A 10809, A 945, A 1000, A 1987). The acreage was surveyed and plats, accounting for natural drainage arroyos, were filed to establish individual lots with specified uses, i.e., residential, multi-family, commercial. Roads were built which provided access to every lot (Exhibit CK—A 10815, A 7030-31). Easements across the northern-most portion of the property held by the Santa Fe Railroad, which might have impaired title, were purchased by the company from the Railroad for approximately \$750,000 (Exhibits KK, KL, and KM, A 7264-67, A 7319-20).

In 1963, AMREP hired Jose Luis Yguado, previously a planner with the Albuquerque City Planning Department, to do a master plan for Rio Rancho's future (Exhibit 2010, A 6543-45, A 6990, A 7131, A 7162-63). Yguado's plan contemplated the development of satellite neighborhoods interconnected with roads and utilities. The plan was to reserve certain large tracts of acreage throughout the propertylater to become core development areas for each neighborhood-and to develop each core area with utilities, houses and commercial facilities in an orderly manner as the community grew (Exhibit 2010). The exchange mechanism, characterized as "a neat concept" by Ralph Avellanet, a prosecution witness (A 4872-73), permitted a purchaser of outlying undeveloped land platted for residential use, to exchange the deed for that land for a deed to land of comparable value in the core building areas then serviced with utilities (Exhibit CK-A 10814).*

As a core area became filled, the plan was for a new core area to be opened, which has in fact happened. Unit 16, the initial core area, is now largely filled. Unit 11, Corrales Heights and Panorama Heights are newer areas now being filled. Rolling Hills, Unit 7 and Unit 17 are the next areas for concentrated building. When all re-

As a result of either exchange, however, a lot owner was usually able to utilize the equity held on the building lot as a full down payment on a single family home (A 6477, and see A 7689).

^{*} So-called "even" exchanges permitted a land owner to exchange his outlying lot of ½ acre for a ½ acre lot in a building area at no extra cost. Other building areas with more extensive improvements, such as underground utilities, paved roads, curbs and gutters and sewers, were also available. On an exchange into such an area, the customer was credited with the then selling price of his outlying lot (which was typically more than the price the purchaser had paid) towards the purchase price of the more extensively improved lot (A 3595-97, A 3623-26).

served core areas become filled and inter-connected, the lots traded in via exchange as well as other lots sold, but not exchanged, would be available for building (Exhibit 2010).

The development of Rio Rancho was never seen as a short term project. Thus, the movie shown at all dinner parties states "Naturally, a property as large as Rio Rancho cannot be developed overnight . . ." (Exhibit 341—A 10327).

As of 1976-1977, despite the enormous panic generated by government charges of fraud, the community at Rio Rancho continues to grow. At the time of trial, 6,500 people had moved from all parts of the country to Rio Rancho (A 3618, A 3634-35). They live in a variety of housing types: single family homes, apartments, condominiums, mobile homes. They shop in a modern shopping center on the property; their children are educated in public schools on and near the property; they receive medical and dental care at medical facilities on the property, including a branch of the Lovelace-Bataan Medical Center; swimming pools, a country club with a golf course and tennis courts, a movie theater, other recreational facilities and restaurants provide means for entertainment. An industrial park which provides employment for hundreds of the residents exists at Rio Rancho largely because of AMREP's land donations to relocating industries. Land donations, too, have been made to four churches (A 3618, A 4434, A 6341-42, A 6493, A 6926-27). One of the best sewage treatment plants in New Mexico treats Rio Rancho's waste (A 4301-02).

AMREP itself moved its national administrative headquarters to an office building at Rio Rancho (A 3618-20). The National Secretaries Association has built its retirement home there and the Felician Sisters have established a Mother House on the property (Λ 6929).

Appellants are not alone in their optimism for Rio Rancho's future growth. Albert Pierce, executive director of the Middle Rio Grande Council of Governments, a prosecution witness, testified that in his view Rio Rancho will experience an "exponential" growth pattern where there will be geometric acceleration in the number of people who will come to live there (A 4439-40).

Jack Graham, president of Albuquerque Federal Savings and Loan Association, testified that at first his bank was unwilling to make mortgage loans on Rio Rancho housing, then in 1968 mortgages were made but only on special terms—high interest and short payouts—more stringent than elsewhere in Albuquerque. By the time of trial, Mr. Graham testified, mortgages were given at Rio Rancho on terms just as favorable as anywhere else in Albuquerque (90% to 95% financing). Albuquerque Federal had a total investment of some \$14 million in Rio Rancho, and, with approval from the federal government, had opened a branch office in the Rio Rancho shopping center (A 6472-80).

Ken Neiswander, a federal appraiser for Albuquerque's FHA office, testified as a prosecution witness that he appraised lots in the developed portion of Rio Rancho at \$5,400 per lot (A 4060). And with the exchange, every residential lot owner has the right to exchange into a developed area.

Appellants were thus shown to have been justified in their belief that Rio Rancho lots would increase in value. There was universal agreement that land values in and around Albuquerque had increased dramatically over the last 20 years, and areas abutting Rio Rancho had increased in value many-fold in a short time (A 5170, A 6585, A 6983-84). Indeed, the prosecution was forced to concede that the phenomenal increases in land values portrayed on page 9 of appellants' brochure "This Is My Land" (Exhibit 384—A 10382) were accurate (A 990).

The Manner by Which Sales Were Made

The proof was that prospective customers were given an extraordinary amount of information on which to base their decision to buy or not, and given a more than fair opportunity to change their minds. The company instituted safeguards which were calculated to protect consumers far beyond what any seller or anyone bent on committing a fraud would ever permit.

Lots in Rio Rancho were sold nationwide, at first by mail order and then, commencing in 1965, by sales presentations at dinner parties (A 752, A 780-81). Despite the prosecution's charges of high pressure salesmanship, the evidence was clear that customers were not browbeaten, hypnotized or coerced (e.g., A 1093-95, A 3066-67, A 6335-36, A 6670, A 6759), that 85% of the people who attended dinner parties ate dinner and left without buying land (Exhibit 361—A 10358-62), and that company-implemented safeguards gave customers three different opportunities to cancel their contracts. Additionally, in times of financial hardship, the company voluntarily gave customers refunds, extended payment terms, and allowed extensive moratoriums on monthly payments (A 2411-14, A 3607-11, A 3061-62).

Seriously undercutting the prosecution's theory that Rio Rancho lots could only be sold by high pressure sales tactics, the evidence was that land purchasers were routinely invited back to dinner parties to meet and speak with prospective customers and that, untutored and uninstructed by the company as to what to say, became the most enthusiastic of the company's "salesmen" (A 1097-98, A 1515-16, A 2189-90).

The sales contract (Exhibit 161a—A 10207-8) was a simple, easy to read single page, printed on two sides. Three cancellation opportunities were provided. Cancellation was permitted within 48 hours if the purchaser had not received copies of the New York and federal disclosure statements at least 48 hours prior to signing the contract.* Under the Truth in Lending Act a purchaser was given an additional 72 hours to cancel after receiving an executed copy of his sales contract (A 3600-05). Since the sales contract was processed and executed in Rio Rancho, New Mexico, it was usually 10 days before a customer received an executed copy of his contract. This 72 hour rescission right thus provided a purchaser with about two weeks in which to cancel (A 3601-02).

The customer was also entitled to a full refund if within six (6) months of purchase he made a personal inspection of his property at Rio Rancho and for any reason wanted a refund (Λ 1285-87, Λ 3605-06). Although the prosecution made much of the fact that a purchaser would have to spend money for the trip in order to exercise the six month cancellation right, the evidence showed that AMREP made

^{*} Since most purchasers received copies of these reports at the dinner party, the effect of this cancellation provision was to give purchasers an absolute right to cancel within 48 hours of sale.

low cost charter flights available, provided meals, lodging and entertainment and, in the event the customer did not cancel, he received a "vacation travel allowance"—a credit (usually \$100 to \$200) applied to his land purchase debt (A 1315-17, A 3612).*

The disclosure statements referred to above (see e.g., Exhibits CK—A 10807 and JW—A 10912), the New York Offering Statement and Federal Property Report, are factually detailed reports about Rio Rancho in a form dictated by state and federal law containing the pros and cons of purchasing the land (A 2384, A 2564). Company policy mandated that each customer receive such reports before signing a contract (A 3587). Particularly relevant is the resale disclaimer contained in the New York report since 1969 (Exhibit CK, p. 3—A 10809):

"Lots may also be purchased for speculative purposes but such purchasers are advised that resale for a profit may be difficult for a number of years in view of the fact that water and utilities may not be available to certain lots for an indefinite number of years; that a percentage of the purchase price paid is included therein for use in advertising and development; and that in trying to make a resale the purchasers may be competing with the Company, which has thousands of lots to sell."

Aside from requiring that a customer be given a copy of the disclosure statement, the New York regulatory agency,

^{*} Interestingly, after two years of investigation and 4 series of questionnaires sent to many thousands of Rio Rancho customers, most of the prosecution's 23 so-called "victim" witnesses visited their property within 6 months of purchase, had a great time on the company tour, received the vacation travel allowance, and upon seeing their land purchase, signed that they were satisfied with it (see e.g., A 2250, A 2679, A 2985-86, Exhibits BU—A 10805, CA—A 10806, FD—A 10911).

the Department of State, operated under rules and regulations which mandated its close scrutiny over AMREP's advertising and sales methods. Thus, all advertising, promotional literature and films, after verification by AM-REP's fact verifier and approval by AMREP's legal department, were submitted to the Department of State for review as to "form, language, and content" and a finding that they were not in violation of New York's Real Property Law Article 9A, which prohibits false representations (A 3557, A 3565). The review was based upon information provided in the disclosure statements as well as the Department's periodic independent on-site inspections of Rio Rancho (A 3562-63). It was only after AMREP received permission to use a piece of advertising by the Department of State's assignment of a number to it ("NYA -") that the advertisement was used in selling (A 3556-58). When permission was not granted the advertisement was not used (A 3556-58).

Additionally, the Department of State made unannounced monitorings of dinner parties, and required the submission to it of all proposed price increases (A 1082-83, A 3590-91, A 3594-95).

AMREP had internal policies designed to prevent salesmen from making misrepresentations. Each salesman was required to be licensed and underwent a training program to acquire knowledge of Rio Rancho. All present and former AMREP employees testified that the strict company policy was to forbid misrepresentations (see e.g., A 2216-17, A 2397, A 2383-84). Especially relevant is the tes-

timony of Lawrence Perlmutter, a vice president of the corporation, called as a prosecution witness:

- "Q. Mr. Perlmutter, you know, do you not, that it is company policy never to represent or to have represented that there is a resale market for Rio Rancho land?
 - "A. Yes, sir.
- "Q. That the company never allowed or permitted a representation that people could make a quick profit on their land?
 - "A. Not to my knowledge, no." (A 3581)

Similarly, Howard Mandel, a former national sales manager for the company, stated:

- "Q. People were never told there was any ready resale market, were they?
 - "A. They were not, sir.
 - "Q. Or they could make money overnight?
 - "A. They were not." (A 1088)

And see Exhibit 1405.

Violation of this self-imposed regulation resulted in the salesman being fired and the customer's money refunded (A 2216-17, A 3610).

ARGUMENT POINT I

The Trial Court Prohibited Appellants from Arguing and Refused to Instruct the Jury on the Essential Defense that They Believed the Sales Characterizations Charged in This Case as Fraudulent Had Been Approved as Lawful by Governmental Agencies which Closely Regulated the Land Sales Industry.

Appellants' fraud convictions are based on their opinions that Rio Rancho lots were "good investments" and that the direction of Albuquerque's growth would be "only" towards Rio Rancho. These opinions, amounting to no more than subjective characterizations, were permitted by the Department of State to be used by appellants in their advertising over more than a decade.

There was abundant evidence from which a properly instructed jury having heard unimpeded argument could have found that appellants lacked fraudulent intent because they believed that their advertising characterizations of Rio Rancho lots as "good investments" and as lying in the "only" direction in which Albuquerque would grow had been approved as lawful by government regulators. The trial court's prohibition on arguing this defense to the jury, its refusal to instruct the jury on this defense as requested and its charge eliminating this defense from consideration was, we submit, fundamental error requiring reversal and a new trial. United States v. Pennsylvania Industrial Chemical Corp., 411 U.S. 655 (1973); United States v. Barker, 546 F. 2d 940 (D.C. Cir. 1976).

The claimed falsity of the investment and growth to the northwest representations was the basis of the prosecution charge. These representations were made principally in advertising literature which throughout the 15 year existence of the company was required to be submitted for review to various state agencies, including the New York Department of State (A 3556-57).* No advertising (or TV

At sentencing, Judge Metzner took note of the government's disparate treatment of companies in the land sales industry:

"The resolution of the question is the length of sentence has been seriously compromised by the government's action in dealing with other large land developers who appear to have been just as guilty of the same type of wrongdoing as these defendants. All of them have been punished after negotiation between the government and the alleged wrongdoers with cease and desist orders or permanent injunctions against repeating the offenses in the future.

As examples, I refer to the cease and desist order entered on consent involving the Gulf American Corporation in February 1974. The cease and desist order entered against Los Alamos Ranch and others in 1975.

The cease and desist order entered on consent against Flagg Industries, Inc. in Fabruary 1975.

(footnote continued on next page)

^{*} Virtually the same representations at issue in this case—"good investment"—were used throughout the land development industry by prominent public companies. This industry-wide representation was countenanced by every state regulatory agency until approximately 1971 when Florida requested a modification of that representation which was voluntarily followed by appellants with respect to its advertising in all states. The point is that the means and methods of sales-including the representations made-were not original and particular to AMREP. Investment representations of the type at issue here were the way a whole industry conducted its business and was permitted to do so by the government agencies which closely regulated it. Particularly unfair is the fact that the government chose to single out AMREP in challenging this industry-wide conduct with criminal charges. Thus, ITT-Palm Coast, Gulf American, Flagg Industries, Inc., Rolands International and Las Animas Ranch, Inc., all of whom engaged in interstate sale of subdivided land advertised as "good investments," have entered into cease and desist orders with the Federal Trade Commission and have not been subjected to criminal prosecution (see sentencing memorandum and exhibits submitted in behalf of Howard W. Friedman and Henry L. Hoffman, pp. 7-15).

or radio commercials) was used without specific authority of these agencies in their respective jurisdictions (A 3557).

The evidence on this issue was uniformly to the effect that AMREP executives and sales personnel believed New York State as well as other states had "approved" as lawful the making of the very representations which are the core of the prosecution.

Despite this evidence and Article 9A of the New York Real Property Law which compels the New York Department of State to independently investigate, review, and approve every sales representation made in New York by a company selling subdivided land, the court prohibited the defense from arguing to the jury that appellants believed they were operating with approval, instructed the jury, contrary to the evidence and the law, that state review did not constitute approval, and refused to instruct the jury that belief of approval would negative intent to defraud.*

And the cease and desist order entered on consent against the International Telephone & Telegraph Company in April 1976." (A 8394)

Also unfair was the trial court's refusal to permit appellants to introduce evidence establishing the industry-wide practice of representing lot purchases in large subdivisions to be good investments (see, e.g., A 1083-84, and see Tr. Oct. 26, 1975, 334-5). Such evidence would have had a direct bearing on the issue of appellants' intent.

That motion was denied on the ground that "the approval . . . did not constitute approval of the merits of the offering . . . and [accord-

(footnote continued on next page)

^{*} Prior to trial, appellants moved to dismiss the indictment on the ground that prosecution of criminal charges founded on conduct performed in reliance on official acceptance of that conduct as lawful violated due process. United States v. Pennsylvania Industrial Chemical Corp., supra, 411 U.S. 655; Cox v. Louisiana, 379 U.S. 559 (1965); Raley v. Ohio, 360 U.S. 423 (1959). And compare, Hughes Tool Co. v. Trans World Airlines, Inc., 409 U.S. 363 (1973) (A 8870-88).

In sum, a fundamental defense properly based in law and in fact—that appellants believed and had reason to believe that what they were doing was lawful—was in part ignored and otherwise thwarted by the trial court.

Evidence at Trial Relating to Agency Approval

Virtually every company employee called by the prosecution, including sales and administrative executives, testified that it was their unequivocal understanding that all sales literature and advertising claims were reviewed for content by state agencies for their respective jurisdictions and not used unless permitted (A 828, A 1080-83, A 1294-95, A 1494-96, A 2042-43, A 2396, A 3556-65, A 3590-95). Thus, Howard Mandel, a prosecution witness, testified on direct examination:

"Q. Before a piece of advertising of promotional material could be used who had to approve it? A. If it was New York, New York State had to approve it." (A 828)

And Lawrence Perlmutter, AMREP's administrative vice president, also called as a prosecution witness, testified:

ingly] does not constitute an acceptance of the statements made as true." (Op. Metzner, J., June 30, 1976, p. 2, A 9562-63.)

Appellants maintain that the denial of their motion was error, resulting from a misapprehension on the part of the trial court of the meaning of the disclaimer that the agency was not "pass[ing] upon the merits of the offering." What the trial court overlooked was that appellants never contended that New York or any other state endorsed the product; rather, appellants maintained, and do so now, that the Department of State did as required by law and passed upon the bona fides and propriety of the representations made to induce the sale.

In any event, appellants contend that a good faith belief that a governmental agency approved the advertising representations as lawful negatives an intent to defraud and provides a defense to the charges.

"Q. . . . Do you know what an NYA number is? A. Yes, I do.

Q. What is it? A. An NYA number is an approval number given by New York State for literature or any advertising to be put on prior to it being used.

Q. Is it not company policy to submit all advertising to the New York State Department of State for review and approval prior to use? A. Absolutely.

Q. On occasion, to your knowledge, is it not true that proposed advertising was submitted to the New York Department of State and the New York Department of State suggested certain revisions or changes and they were made by the company? A. Yes, sir.' (A 3556-58)

No sales literature was used without permission of these state agencies (A 3556). Independent inspections of the Rio Rancho subdivision were regularly made over the years by the state agencies and dinner party presentations were monitored without notice to appellants (A 3590-91). The New York Department of State inspected Rio Rancho on site on at least 9 separate occasions (A 3562, A 3564).

Language, form, and content of the New York State Offering Statement, as well as all advertising were subject to modification at the will of the state agencies, and the evidence was that changes in the nature and content of representations were periodically required by New York State and were willingly acceded to by appellants (A 3557-58).

Significantly, the prosecution promise in its opening statement that it would prove that appellants "did not

make full disclosure to the state officials . . . in connection with the claims that they were making about the sale of this land . . . [and that they] knew and were specifically put on notice that the states did not have the resources or the knowledge or the expertise to verify the claim in . . . [the advertising] . . . '' (A 196) came to naught, despite the trial court's ruling in response to objection that ". . . they will be held to those [promises]" (A 197). The prosecution adduced no evidence that appellants were not completely forthright, open and cooperative in their dealings with state regulatory agencies.

Law Relating to Agency Approval

The evidence was that sales methods and representations were uniform throughout the country. Nonetheless, the New York Department of State was the principal regulatory agency with which appellants dealt.

New York State has a comprehensive and exacting regulatory scheme with the avowed purpose of preventing fraudulent practices in connection with the sale of subdivided lands. (New York Real Property Law, Article 9A, and see, e.g., 1960 Op. Att. Gen. 65.) An Offering Statement, in which the form and content of disclosure is dictated by the New York Department of State, is required as a predicate to selling (Real Property Law, §§337-b; 339-b). Offering Statements, one of which was required by AMREP policy to be provided to every prospective customer, may not be approved for use unless "an inspection of the subdivision has first been made . . . [of] the property embraced and described in the statement" (19 N.Y.C.R.R. §135.12[a], and see Real Property Law, §338).

Similarly, prior to use, each and every piece of advertising literature must be reviewed by the New York Department of State, and may not be used unless and until permission is granted. This mandatory procedure amounts in a real sense to an absolute requirement of approval prior to use.

Thus, 19 N.Y.C.R.R. §135.17(a) prohibits the use of any advertising material "unless a copy . . . has first been accepted for filing and an advertising number (NYA——) assigned by the Department of State." And Regulation §135.17(e) provides as follows:

"In reviewing the advertising or promotional material the Department of State will determine whether the same is in violation of Article 9-A of the Real Property Law and the applicable sections of this Part by examining form, language and content of the material, as supported by the record and other information available to it." (Emphasis supplied.)

Since Article 9-A of the Real Property Law prohibits "any false... representation concerning any vacant land..." (Real Property Law, §338.5[b]), a determination by the Department of State after "examining form, language and content" and conducting its own independent investigation that advertising is not "in violation of Article 9-A" is approval pure and simple, *i.e.*, a finding that the reviewed advertising contains only lawful representations.

There is no claim that immunity would flow from a successful scheme to conceal facts or misrepresent facts from

^{* &}quot;Other information" refers to independent investigation by the department, including periodic on-site inspections.

the Department of State. There was no proof—nor could there have been—that appellants failed to disclose information about Rio Rancho to the Department of State or tendered false information. Especially significant is the fact that since 1969, the New York Offering Statement contained the warning that "resale for a profit may be difficult for a number of years" (Exhibit CK—A 10809). Fully aware of that fact, the Department of State nonetheless continued to permit AMREP advertising to contain appellants' characterization that the purchase of Rio Rancho lots was a good investment.

In addition to reviewing advertising and promotional material, the Department of State mandates submission along with the disclosure statement of "a full and complete description of the sales method or methods to be employed in the sale of any lot . . . of the subdivision" (19 N.Y.C.R.R. §135.13[a]).

The Department of State also requires that it be notified of an intended "sales meeting, reception, party or gathering" seven days in advance and the Department reviews notices and advertisements "which are used to call and advertise the meeting" (19 N.Y.C.R.R. §135.13[c][8]).

The Trial Court Forbade Appellants to Argue that They Lacked the Requisite Intent to Defraud Because of Their Belief that Their Conduct Was Approved by State Agencies and Instructed the Jury to the Contrary.

A principal defense theory was that appellants believed their representations lawful because of the close scrutiny, review, and ultimate approval by governmental agencies. Yet, the trial court forbade counsel to argue to the jury "... that they had the right 'they' meaning the defendants, had the right to believe that, for example, the State of New York approved this document [a piece of promotional literature] and the statements contained in it" (A 7475). Defense counsel's request that he be allowed to "argue that if there was evidence that they believed it, that would go to their good faith or intent" was firmly rebuffed by the trial court:

"The Court: No. You can say the fact that they complied with the law and circulated those reports would show their endeavor to comply with the law. That's what you requested earlier and that you get.

But you can nowhere draw any inference that these defendants had any basis upon which they could believe that the State of New York approved the statements in that prospectus" (A 7475-76).

The court refused, moreover, to permit defense counsel to refer in his "... summation to precise testimony, such as Perlmutter and Mandel and Lederman ...", reflecting the understanding of these corporate officials that the New York Department of State reviewed and approved advertising. The court admonished counsel:

"The Court: Don't do it, Mr. Arkin, I am telling you, because I will tell the jury you are wrong.

No basis for anybody in this business to have any inference that the approval by the State of putting the number on approved what was said in the document, none" $(\Lambda 7476)$.

Defense requests that the jury be charged that appellants' belief that governmental agency review constituted approval which negatived intent and that appellants' knowl-

edge that Rio Rancho had been inspected by government inspectors, dinner presentations monitored, and sales literature modified by the state could be considered as evidence on the issue of appellants' belief that their conduct was lawful were all denied.*

Instead, the court, in the course of marshalling defense contentions, charged the jury as follows:

"They bring out their adherence to all state and federal agency regulations, and their complete compliance with all contract promises.

Here I want to mention that the filing of property reports and promotional literature with state and fed-

* Defense Requests Nos. 26 and 27 are as follows:

Request No. 26

You may consider evidence that defendants used advertising material only after it was submitted to and reviewed by state agencies and that defendants believed that such review constituted approval of the representations made in the advertising as negativing the existence of defendants' knowledge of falsity or intent to defraud (A 8249).

Request No. 27

Evidence that defendants had knowledge that inspectors from the State of New York made inspections at Rio Rancho, attended dinner parties without prior announcements and made or requested changes to be made in advertising are all circumstances which you should consider in determining whether defendants believed that the review of advertising material by the state agencies constituted a determination by those agencies of the lawfulness of the representations made in advertising (A 8250).

The trial court denied these requests and stated:

"As I read this, you are saying that the approval by state agencies shows that the defendants believed the review constituted approval. That's what it says.

But on a request that the defendants believed that the approval or the passage by the state agency 'constituted approval of the representations' I will not tell the jury.

In fact, I will tell them just the opposite if you so refer to it in your summations, and I said that to you in December." (A

7474-75)

eral agencies is required by law. The acceptance by the agency of the filing and, for example, giving an NYA number for a brochure, indicates only that the defendants furnished the information required by state law. It does not indicate a view by the governmental agency as to the truth or falsity of the statements contained in such material" (A 7983).

As to the significance of review by the New York Department of State, the court was clearly wrong, and nowhere did the court instruct the jury that it might find appellants' good faith or a lack of intent to defraud from their belief that their sales representations were lawful because approved by state agencies. This failure by the trial court is inconsistent even with its own ruling pretrial denying appellants' motion to dismiss, but nonetheless stating that:

"While the approvals may be admissible in evidence as negativing knowledge of falsity or intent, they in no way require the dismissal of the indictment." (Metzner, J., op. June 30, 1976 p. 3.) (A 9563)

See also A 3561 where Judge Metzner stated:

"I assume if these [advertising materials] have an NYA number they have been approved."

The Trial Court's Thwarting and Withdrawing of Appellants' Good Faith Defense Based upon Their Belief that the Sales Representations Charged in This Case as Fraudulent Had Been Approved as Lawful by Governmental Agencies Requires a Reversal and a New Trial.

Good faith, i.e, a lack of fraudulent intent, is a basic and absolute defense to a charge of criminal fraud. Durland v. United States, 161 U.S. 306, 314 (1896); United States v.

Ballard, 322 U.S. 78, 82 (1944). Labeling good faith as a "crucial" defense, this Court established a strict rule regarding jury presentation of the defense:

"... no events or actions which bear even remotely on its [i.e., a defendant's good faith] probability should be withdrawn from the jury. . . ." United States v. Brandt, 196 F. 2d 653, 657 (2d Cir. 1952).

In this case, the record establishes that appellants believed their sales representations lawful because of the close regulation, review, and approval of the representations by watchdog agencies. Certainly, if all those sales persons and executives who testified as prosecution witnesses had that belief, and they did, it is a fair-indeed compelling—inference that appellants had the same belief. The trial court's restriction on argument to the jury (". . . you can nowhere draw any inference that these defendants had any basis upon which they could believe that the State of New York approved the statements . . . " [A 7475-76]), its injunction against reading highly relevant trial testimony to the jury during summation, its refusal to instruct the jury that it was permissible to find "good faith" from a belief that state agency permission to use advertising following its review of "form, language and content" constituted approval of the representations made, and its charge that "... [t]he acceptance by the agency of the filing . . . does not indicate a view by the agency . . . as to the truth or falsity of the statements contained in such material . . . " (A 7983) completely eliminated this "crucial" defense from the case.

Appellants' belief that the sales representations they repeatedly made over 15 years were consistently accepted as lawful by government agencies is surely the kind of "event or action" bearing on the probability of good faith which this Court warned in *Brandt* "should [not] be withdrawn from the jury." Much more than a "remote" bearing on the probability of good faith, the core of appellants' good faith defense was their belief that the very conduct alleged as criminal had been continuously accepted and approved by the governmental agency charged with the duty of examining, reviewing and passing its official judgment upon that conduct.

The withdrawal of that defense from the jury was devastating and requires reversal and a new trial.

It is fundamental that a reasonable and honest belief that conduct has been approved or deemed lawful by a government agency negates the mens rea element of a criminal charge based upon that conduct.* United States v. Pennsylvania Industrial Chemical Corp., supra, 411 U.S. 655; Cox v. Louisiana, supra, 379 U.S. 559; Raley v. Ohio, supra, 360 U.S. 423; Model Penal Code, §2.04(3)(b); see also, Proposed New Federal Criminal Code, Final Report of the National Commission on Reform of Federal Criminal Laws, §609 (1971).**

^{*} This defense is to be distinguished from a classic "mistake of law" where a defendant asserts his erroneous view of the law as a defense. See, e.g., United States v. Ehrlichman, 546 F. 2d 910, 918 (D.C. Cir. 1976), cert. denied, — U.S. —, 45 U.S.L.W. 3572 (February 22, 1977).

^{**} The Proposed New Federal Criminal Code, §609 (1971), provides in relevant part:

[&]quot;... a person's good faith belief that conduct does not constitute a crime is an affirmative defense if he acted in reasonable reliance upon a statement of the law contained in:

⁽footnote continued on next page)

The Model Penal Code, §2.04(3)(b) states the defense as follows:

"A belief that conduct does not legally constitute an offense is a defense to a prosecution for that offense based upon such conduct when:...(b) he acts in reasonable reliance upon an official statement of the law ... contained in ... (iii) an administrative order or grant of permission, or (iv) an official interpretation of the public officer or body charged by law with responsibility for the interpretation, administration or enforcement of the law defining the offense." (Emphasis supplied.)

There is and can be no dispute that appellants were continuously granted official permission to utilize advertising containing the characterizations regarding investment and direction of growth charged as criminal conduct in this case.

United States v. Pennsylvania Industrial Chemical Corp., supra, 411 U.S. 655 ("Picco"), is closely analogous. The defendant in that case was federally prosecuted for violating §13 of the Rivers and Harbors Act of 1899 because its industrial refuse had been discharged into a navigable river. It was the defendant's contention at trial that the Army Corps of Engineers—the administrative agency responsible for enforcement of the 1899 Act—had continually

⁽a) a statute or other enactment:

⁽c) an administrative order or grant of permission; or

⁽d) an official interpretation of the public servant or body charged by law with responsibility for the interpretation, administration, or enforcement of the law defining the crime." (Emphasis supplied.)

permitted others to make refuse discharges which did not impede or obstruct navigation. Accordingly, based on government permission to others to make such refuse discharges, Picco believed that its own similar discharges which did not impede or obstruct navigation were lawful.

The trial court refused to permit Picco to prove that it had relied on government permission and thus believed that its conduct was lawful. The Supreme Court held that ruling to be error and remanded the case to the trial court to permit Picco to develop a record on "whether there was in fact reliance and, if so, whether that reliance was reasonable" (id., 411 U.S., at 675). The Supreme Court unequivocally ruled that Picco was entitled to adduce evidence and argue as a defense that based upon government permission of similar conduct of others it held a reasonable belief that its own conduct was lawful. Mr. Justice Brennan wrote as follows:

"... we hold that it was error for the District Court to refuse to permit Picco to present evidence in support of its claim that it had been affirmatively misled into believing that the discharges in question were not a violation of the statute." Id., 411 U.S., at 675.

More compellingly than in *Picco*, where the claimed reliance was on permission accorded others, appellants here were thwarted in their defense that they had relied upon government approval of and permission for *their own conduct*—indeed, the very conduct charged as criminal and upon which they now stand convicted—and thus believed that conduct to be lawful.*

^{*} As in *Picco*, moreover, AMREP was part of an industry where sales representations virtually identical to their own were common-place and subjected to government review and approval.

⁽footnote continued on next page)

And see, *United States* v. *Insco*, 496 F. 2d 204, 209 (5th Cir. 1974) (where the Fifth Circuit reversed a federal election law conviction because the defendant "... was lulled [by a 'confluence' of factors] into the reasonable impression that ... his conduct did not run afoul of the federal [statute]"); *United States* v. *Diamond*, 430 F. 2d 688, 693-694 (5th Cir. 1970) (where a mail fraud conviction based upon alleged false representations regarding land

Thus, Horizon Corp., a New York Stock Exchange company, advertised Horizon City outside of El Paso, Texas, in these words (see Exhibit G, sentencing memorandum submitted in behalf of Howard Friedman and Henry Hoffman ["sentencing memorandum"]):

"El Paso has already DOUBLED ITS POPULATION in the past ten years, AND EVEN GREATER GROWTH IS EXPECTED IN THE COMING DECADE: Can you imagine what impact this growth will have on the values of land . . . as more and more people arrive, needing more homes, more schools, more places of worship, more shopping centers . . . MORE OF EVERYTHING INCLUDING LAND ON WHICH TO BUILD THEM."

The fact that El Paso can only grow to the east because it is surrounded on three sides is given as a major reason why land values will rise in Horizon City.

Rio Communities, a 242,000 acre Horizon project, is located outside Belen, New Mexico, some 25 miles south of Albuquerque. Its brochure tells the customer "why fortunes are now being made from real estate in the booming, sunny southwest" (Exhibit I p. 3, sentencing memorandum). The "population explosion" has an effect on real estate. "You can buy land today near the city limits of any of our fast-growing areas . . . and you can almost be certain that you will sell it for handsome profits in the short years ahead."

Horizon described the investment potential of Arizona Sunsites, another of its developments, in these words (Exhibit N p. 2, sentencing memorandum):

"Yes, the story of land values in Arizona—particularly within the past ten years—is an amazing, and amazingly profitable, one. Profits have been made in Arizona land. And they continue to be made, by real estate investors who purchased land, wisely choosing the type, size, location . . . and price that suits their individual situation.

located in Arizona ["Arizona Ranchettes"] was reversed because the trial court excluded from evidence portions of an Arizona Real Estate Department file which would have demonstrated that the defendants had requested and received official permission to sell advertised land).

It may be suggested by the prosecution that the approval of sales literature by New York State or other states is not unlike SEC approval of a prospectus or other disclosure

Whether your real estate investment is a single residential site, parcels of 5 or more acres, business property in a commercial area—or, to balance your portfolio a combination of all three—it's my opinion that putting your money into land—good Arizona land—is one of the most secure investments you can

ITT's Palm Coast is a 100,000 acre development in Florida which was advertised in 1972 as follows:

"As land becomes scarcer, it tends to go up in cost. The faster the rate of population growth, the more desirable the land be-

Of the 10 largest states in the nation, Florida shows the highest population growth rate. The U.S. Bureau of Census says that Florida's population will increase about 60% by 1985.

Under these circumstances it is not surprising that Florida land prices have soared in recent years.

What financial experts say all ut Florida land.

The figures on Florida land prices tell their own story: an increase of 78% since 1964. And many nationally recognized financial writers feel this long-range trend will continue." (Exhibit Q, sentencing memorandum.)

Gulf American began a development 14 miles outside Naples, Florida, called Golden Gate Estates. Its brochure advertises 5-acre tracts as a big value "whether you resell later as a unit or subdivide into 16 homesites." "The sale of a single homesite could pay for your entire tract." (Exhibit S, sentencing memorandum.)

River Ranch Acres is another Gulf American development in Florida. Its great investment potential was touted because "Florida can or v grow inward from its already inland-expanding coast-line

(Exhibit U, sentencing memorandum.)

As previously mentioned, the federal government chose to deal with these companies by way of cease and desist orders and other civil remedies.

statement and as such does not constitute approval in the sense of an acceptance of the representations made as true or proper. Concededly, as the required legend on sales literature declares, approval by New York State does not mean that it has "in any way passed upon the merits of such offering" (19 N.Y.C.R.R. §135.17[b]). In other words, there is no official endorsement of the product. But such a contention by the prosecution that regulation by the New York Department of State is no different from that of the SEC is wide of the mark. The point is that unlike the 1933 or 1934 Securities Acts (or for that matter the Federal Interstate Land Sales Full Disclosure Act under which appellants also filed comprehensive disclosure statements), in New York (and other states such as Florida) the regulatory agency is mandated by law to independently investigate and make a determination of the trustworthiness and accuracy of sales representations made by the developer. To be sure, New York State did not recommend purchase, it did not "pass upon the merits of the offering," but it did pass upon the bona fides of the offer.

But whether the New York Department of State or other regulatory agencies in fact or as a matter of penetrating legal analysis approved appellants' sales claims is not the point. The defense thwarted by the trial court is premised upon whether appellants honestly believed that their sales claims had been approved. That critical distinction formed the basis for reversal in *United States* v. Barker, supra, 546 F. 2d 940.

In that case, Barker and Martinez—two of the now infamous White House "plumbers"—were charged with conspiracy to violate the civil rights of Dr. Fielding by

searching his office for Daniel Ellsberg's psychiatric records. They sought to defend the charge on the theory that they had a good faith belief that E. Howard Hunt, their superior in the mission, had official, governmental authority to conduct the mission and that their reliance on that authority negated the mens rea required for the crime charged. The trial court prevented Barker and Martinez from defending the charge on that theory making the same erroneous rulings Judge Metzner made in the instant case, i.e., jury argument was restricted; the defendants' proposed jury instructions setting forth their defense theory were rejected; and the jury was instructed that a belief in the legality of the mission was no defense.

The D.C. Circuit reversed the Barker and Martinez convictions holding that "... the refusal of the District Court to allow them a defense based upon their good faith, reasonable reliance on Hunt's apparent authority..., [a belief] which negated the mens rea required for [the] violation..." (id., 546 F. 2d, at 946), was error. The Court stressed that in determining whether the defendants were entitled to assert the defense of good faith and reasonable reliance on Hunt's authority, the inquiry was not whether Hunt in fact or in law possessed such authority but rather whether there were facts justifying defendants' reasonable reliance on Hunt's authority and a legal theory on which to base a reasonable belief that Hunt possessed such authority. In language particularly apposite here, the Court wrote:

"[It] may be right [that the Chief Executive has no power to authorize a warrantless search and seizure]. But that is not the issue here for Barker and Martinez. The issue is whether, given undisputed facts as known and represented to them, it was reasonable in 1971 for

Barker and Martinez to act on the assumption that authority had been validly conferred on their immediate superior." (Emphasis in the original.) *Id.*, 546 F. 2d, at 950.

Here, there is abundant evidence to justify a finding that appellants in fact reasonably relied on the Department of State's review and approval of their advertising as official guidance that their advertising was lawful (see pp. 20-22, supra). And the statutes and regulations under which the Department of State operates provided ample legal justification for appellants to have based their belief that the Department of State reviewed and approved their advertising (see pp. 22-24, supra).

Thus, as in *Barker*, *supra*, "the refusal of the District Court to allow them a defense based upon their good faith, reasonable reliance" on the Department of State's approval of their advertising, a belief "which negated the *mens rea* required for the violation" was error.

The rule in this Circuit is firmly established that a defendant is entitled to jury instructions on any defense theory for which there is any factual support in the record. United States v. Platt, 435 F. 2d 789, 792 (2d Cir. 1970); United States v. O'Connor, 237 F. 2d 466, 474, n.8 (2d Cir. 1956). The rule was stated in United States v. O'Connor, supra, as follows:

"A criminal defendant is entitled to have instructions presented relating to any theory of defense for which there is any foundation in the evidence, no matter how weak or incredible that evidence may be." (Emphasis supplied.) *Id.*, 237 F. 2d at 474, n.8

And in determining whether "there is any foundation in the evidence" to justify an instruction on a defense theory, the evidence must be viewed in the light most favorable to the defendant. United States v. Licursi, 525 F. 2d 1164, 1168-69 (2d Cir. 1975); United States v. Anglada, 524 F. 2d 296, 298 (2d Cir. 1975); United States v. Cohen, 431 F. 2d 830, 832 (2d Cir. 1970); United States v. Dehar, 388 F. 2d 430, 433 (2d Cir. 1968).

In this case, the unrebutted evidence viewed in the light most favorable to appellants is that they reasonably and honestly believed that all advertising claims were reviewed by state agencies as to "form, language, and content" and approved prior to use. There was thus more than ample basis in the record from which a properly instructed jury having heard unrestricted argument could have found that appellants used their advertising over a fifteen-year period believing it to have been approved by state agencies and, in good faith, believing they were in compliance with law. The trial court's rulings and instructions foreclosed jury determination of this crucial defense that appellants acted in good faith and without the requisite intent to defraud.

It follows that the judgments of conviction must be reversed and a new trial ordered.

POINT II

The Evidence Failed as a Matter of Law to Establish That Appellants Did Not Honestly Believe Their Opinions About Albuquerque's Growth and the Value of Rio Rancho as an Investment.

Appellants' convictions rest on the prosecution claim that they falsely represented Rio Rancho to their customers in two particulars:

- (a) that the direction of Albuquerque's growth could only be to the northwest, *i.e.*, towards Rio Rancho; and
- (b) that the purchase of lots in Rio Rancho was a "good investment."

These representations were made in sales brochures, movies and oral presentations since 1965, and may be fairly said to have been designed to convey appellants' opinions about the merit of owning land at Rio Rancho.

This prosecution, we suggest, represents an unfair and unnatural straining of the criminal process to its outer limits and beyond. The convictions, rather than justifying the indictment, demonstrate in our view the treacherous consequences of charging as criminal, conduct of debatable definition. Appellants' opinions—and they are no more than that—of the worthiness of their product were simply not proven to have been venally inspired. And the prosecution utterly failed to establish as was its burden, that appellants did not honestly hold these opinions. At most, the prosecution adduced evidence that the opinions may not have been universally held.

We submit that the evidence established ample justification for appellants' opinions about Rio Rancho and that there was insufficient proof that they did not honestly hold such opinions.

A. The Evidence Was Insufficient to Establish That Appellants Did Not Honestly Believe Their Opinions about Albuquerque's Growth and the Investment Value of Rio Rancho Lots.

Appellants' representations about the future direction of Albuquerque's growth and the value of Rio Rancho land as an investment are statements of opinion which can sustain a fraud conviction only upon proof beyond a reasonable doubt that the opinion is not held in good faith or honestly believed. *United States* v. *Grayson*, 166 F. 2d 863, 866 (2d Cir. 1948); *United States* v. *Rubinstein*, 166 F. 2d 249 (2d Cir.), cert. denied, 333 U.S. 868 (1948). As this Court wrote in *Rubinstein*:

"Even if these statements were but expressions of opinion, pertaining to future matters only, the making of them implied that the makers believed them to be true. If this belief were not honestly entertained, therefore, the statement contained a misrepresentation of present fact." (Emphasis supplied.) Id., at 255.

In the case at bar there was overwhelming proof that appellants "honestly entertained" their belief that Albuquerque's future growth could occur only toward the northwest in the direction of Rio Rancho and that lots in the Rio Rancho subdivision were a good financial investment. No prosecution evidence whatever established that appellants did not actually hold such beliefs. To the contrary, there was sound and ample justification for appellants to

conclude that the only direction in which growth of Albuquerque could occur was to the northwest thus making lots in Rio Rancho a "good" investment. In addition, appellants' continuous development of Rio Rancho and enormous financial investment (as well as the extraordinary investments of other persons and institutions) in its growth is powerful evidence of the *bona fides* of their belief in Rio Rancho as a "good" investment.

For a vendor to characterize its product in positive, enthusiastic or even hyperbolic or absolute terms is ingrained, traditional and accepted sales practice in America. Courts have consistently and repeatedly recognized that "sellers talk"—expressions of one's opinion in absolute terms about a product—is not a crime. See, e.g., Harrison v. United States, 200 F. 662, 665 (6th Cir. 1912); United States v. Regent Office Supply Co., Inc., 421 F. 2d 1174, 1180 (2d Cir. 1970).* The point is that unlike false statements of an objectively determinable fact, our courts, consistent with custom and usage in this country, do not condemn as a fraud the expression of glowing or optimistic adjectives about one's product.

^{*}Use of absolutes such as "only" in sales representations have been held to be "sellers talk" and not fraud. E.g., Bose Corporation v. Linear Design Labs, Inc., 467 F. 2d 304, 310-311 (2d Cir. 1972) (sales claims that a certain loudspeaker system had the "most life-like" and "most exacting" reproduction of sound); Anheuser-Busch, Inc. v. DuBois Brewing Co., 175 F. 2d 370, 376 n.12 (3d Cir. 1949), cert. denied, 339 U.S. 934 (1950) (claim that a particular brand of beer was "the original"); American Brands, Inc. v. Playgirl, Inc., 498 F. 2d 947, 949 (2d Cir. 1974) (representation that Playgirl "alone and uniquely" reaches a particular advertising audience while deemed by this Court to be "exuberant" was held not to be fraud); Telex v. Schaefer, 233 F. 2d 259 (8th Cir. 1956) and Scott v. United States, 263 F. 2d 398 (5th Cir. 1959) (related civil and criminal cases holding that representations of "easy money" and "assured profits" in respect to the sale of radios for leasing in a hospital was not fraud).

We submit that the evidence failed as a matter of law to establish that appellants did not hold an honest belief in the accuracy of both their opinions (a) that Albuquerque's future growth could only occur to the northwest and (b) that Rio Rancho lots were a good investment. Accordingly, we seek a reversal of the judgments of conviction and a dismissal of the indictment. In the alternative, the prosecution's failure to prove that appellants did not hold an honest belief in the accuracy of either of their opinions requires a new trial. See, e.g., Yates v. United States, 354 U.S. 298, 311-312 (1957); Stromberg v. California, 283 U.S. 359, 367-368 (1931); United States v. Natelli, 527 F. 2d 311, 325 (2d Cir. 1975), cert. deried, 425 U.S. 934 (1976).

1. Appellants Were Justified in Their Opinion that Albuquerque's Future Growt^L Could Only Occur to the Northwest and in any Event the Prosecution Failed to Prove that They Did Not Honestly Believe in the Accuracy of Their Opinion

The evidence was uncontradicted that Albuquerque has unique natural and legal impediments to its growth to the north, east and south (see, e.g., A 4330-31). Similarly, title problems have long made the prospect of development due west and southwest of the city uncertain at best (see, e.g., (A 4624-25, A 4669-70). Also uncontradicted is the fact that experts uniformly agreed in the 1960's that by 1985 Albuquerque's population (262,000 in 1961) would increase by half a million people (see, e.g., Exhibit 60—A 9980-10060).

Based upon these factors and the historical density of dwelling units in Albuquerque, appellants justifiably predicted that the anticipated growth would necessarily occur where there were no impediments to growth, *i.e.*, to the northwest towards Rio Rancho.

Appellants' prediction was supported by the conclusion of their first planner, Jose Luis Yguado. In 1963, prior to his planning contract with Rio Rancho, or any other relationship with appellants, Mr. Yguado stated in his "Growth and Development Study, Northwest Mesa Area—Albuquerque, N. Mex." (Exhibit EK, p 7—A 10875):

"These imposed limits to the East, North and South leave no alternative for expansion except to the West. It is reasonable to assume that any major expansion of the City to accommodate necessary growth and development in the ensuing years shall be to the Northwest Mesa Area."

Appellants never represented that no building lots were available in other parts of Albuquerque or that the only place a home could be built was in the northwest. Fairly read, appellants' prediction was that Albuquerque's future growth would occur to the northwest.

Appellants were not alone in their views. Thus, Jack Graham,* president of the Albuquerque Federal Savings and Loan Association, explained the reason for opening a branch of his bank at Rio Rancho as follows:

"... There is only one place the population of Albuquerque could shift to, it's the Northwest Heights..." (A 6479).

^{*}Mr. Graham testified that his bank, through a wholly owned subsidiary, AMDEC, was engaged in "land acquisition and development" (A 6471) in Albuquerque and accordingly was current on land availability (A 6551):

[&]quot;We keep a continuing inventory of all land in Albuquerque so that we can constantly look for land to buy. The way Albuquerque is now with the planning commission, with the requirements for planning, it takes a very large block of acreage to set up a subdivision, and it takes a lot of money to develop that subdivision.

Consequently, we know where all the large blocks of acreage are."

Mr. Graham explained that there were impediments to Albuquerque's growth to the east, south, due north and due west (A 6483-86), and concluded:

"Consequently, as Albuquerque grows the only place Albuquerque can grow, and we have known this for a long time, is to the northwest." (A 6486).

Mr. Graham agreed with the accuracy of appellants' advertised opinion as to Albuquerque's future growth:

"Q Mr. Graham, would it have been accurate in the mid-1960's to make a representation that Albuquerque's future growth pattern was predestined that it must take place to the northwest?

A That's an accurate statement if we grow.

Q You mean, meaning if people have babies and things like that?

The Court: Or people come in.

Q Or people come in? A Yes, sir.

Q Is that statement or would that representation be accurate today? A Very definitely.

Q Is that prediction coming true today? A Yes." (A 6489)

Graphically, when Mr. Graham was asked to trace a line on prosecution's Exhibit 1075A—the aerial mosaic of Albuquerque—indicating the direction of Albuquerque's growth, the line went directly through Rio Rancho:

"Q May I ask you if the end of your line, or if your line traverses Rio Rancho? A Yes.

Q It goes through Rio Rancho? A Yes." (A 6552)

Reverend John B. Rupley, pastor of the All Saints Lutheran Church near Rio Rancho, was a past president and board member of Albuquerque's West Side Association (A 6590-91), "a chamber of commerce for the northwest and southwest quadrants of Albuquerque" (A 6592). As a result of his work with the Association, Reverend Rupley had the following opinion as to Albuquerque's growth:

"Q As a former president and member of the West Side Association and as a resident in Bernalillo County since 1968, would you answer yes or no in the first instance, do you have an opinion as to the direction of growth of the city of Albuquerque? A It can only go west and northwest" (A 6593).

Reverend Rupley expressed his views on appellants' advertised opinions on Albuquerque's growth as follows:

"Q Now, going back to 1968 when you decided to come to Albuquerque and based upon what you learned about Albuquerque, would you agree or disagree with this statement and I am reading from 'This Is My Land,' Exhibit 384....

'According to experts Albuquerque's future growth pattern is predetermined. It must take place toward the northwest.'

Did you believe that in 1968? A Yes." (A 6595-96)

"Q Would you have agreed with this statement in 1968, Reverend . . . [Exhibit] 384, the same page.

'In the case of Albuquerque and her future growth, limitations on her boundaries have always existed. Mountains to the east and the federal state and reserve land along the northern, southern and part of the western borders are now virtually containing Albuquerque's future growth.'

A That is essentially what I said, yes.

Q Was that your belief when you came to the church? A Yes.'' (A 6597)

"Q Would you agree with this statement of 1972:

'So as a result of this straddling of the city on these three sides, the growth can go in just one direction—one direction only, and that happens to be to the westerly and northwesterly side from the city of Albuquerque in the very path from [sic] Rio Rancho Estates is located. As a matter of fact, today it is physically and geographically impossible for the growth of this city not to first come through Rio Rancho Estates before it gets beyond us. Because this entire growth area is straddled by Rio Rancho Estates.'

Would you have agreed with that in 1972? A Yes because it said west and northwest." (A 6599-6600)

Jose Luis Yguado also testified to his opinion that Albuquerque's growth was predestined to occur to the northwest:

"Q What is your opinion, sir, of the direction of growth of Albuquerque? A Well, I think this is the gas line and I think it is essentially this area (indicating).

From here, this point, to about here (indicating).

Q Which direction is that? A Northwest.

Q For how long have you held the opinion that Albuquerque would grow to the northwest? A Well, I have been in Albuquerque about fifteen years, and after I was there about a year and having worked and looked at Albuquerque, I was of the opinion that it would go to the northwest, so I would say fourteen or fifteen years." (A 6967)

^{*} The "gas line" runs directly through Rio Rancho in a northwesterly direction (see Exhibit 1075A).

Mr. Yguado also agreed on the accuracy of appellants' advertised opinions:

"Q I am reading what appears to be page 7 [of Exhibit 316] . . . Listen to the following quotation, Mr. Yguado.

'Albr ierque is bursting at the seams but the city is surrounded. Albuquerque's expansion is blocked on three sides by high mountain ranges and government reserve lands on which they cannot build. There is only one direction in which Albuquerque can expand, the northwest and that's precisely where Rio Rancho is located.'

Is that a fair statement, Mr. Yguado? A Yes.'' (A 6984-85)

"Q With the same exhibit number, 316, referring to page 25607, the middle of the page:

'Albuquerque is surrounded on three sides on which it cannot build. The city can only expand in one direction and that direction is squarely through Rio Rancho Estates. The city cannot expand beyond Rio Rancho Estates without first going through our property.'

Is that a fair statement as of 1966? A Without question, yes." (A 6985-86)

"Q Referring to that same exhibit, that is page 10, I am going to read the following....

'Hemmed in on three sides, only one direction the city can grow, right through Rio Rancho Estates.'

A I agree.

Is that a fair statement? A Yes, sir.

Q Quoting from page 8 of 388 and I am excerpting I am taking a portion of a sentence which appears there. It says: 'The natural geography of the area makes it clear that this sunshine city's population can continue to explode in only one direction.'

Is that fair to say in 1966? A Yes, it goes on to

say the northwest, yes.

Q If it means the northwest, it is fair to say? Λ Yes.

Q Also on that same page appears the following, is this fair to say in 1966:

'According to experts, Albuquerque's future growth pattern is predetermined. It must take place towards the northwest and this is where most of the new growth activities are taking place.'

Is that a fair statement? A Yes.

Q You agree with it? A Yes, sir." (A 6988-89)

There being no direct evidence that appellants did not honestly believe in their prediction of northwest growth (and overwhelming evidence that they did and had reason to) the prosecution's theory of guilt was necessarily premised on evidence:

- (a) that the projected increase in Albuquerque's population could be accommodated on vacant land within Albuquerque (the "infill" theory); and
- (b) that during the years appellants represented Albuquerque would grow only to the northwest the most absolute growth occurred in the northeast (the "northeast growth" theory).

We submit that neither theory is legally sufficient to sustain a finding of guilt on the specification that it was fraud to claim northwest growth. The "infill" theory has no support in the evidence and at most establishes a difference of opinion which cannot support an inference that appellants' opinion was not honestly held. The "northeast growth" theory ignores the intended meaning of appellants' representation and is based upon prosecution proof that its own interpretation of appellants' representation is false.

(a) The "infill theory"

The prosecution's own witnesses established the fallacy of the "infill" theory. While the theory assumes that the city planners could, by fiat, change the density of Albuquerque, the evidence is clear that the planners failed. In 1960, Albuquerque had 39,040 acres and had a population of 201,189 for a gross density of 5.16 people per acre. In 1970, Albuquerque had grown to 51,604 acres and a population of 256,026. Thus, gross density had declined to 4.96 people per acre. Similarly, between 1962 and 1973 the developed density had also declined from 9.8 people per acre to 7.5 people per acre (Λ 4710-13).

The Avellanet report (Exhibit 66—A 10061-10123), admittedly a "crude estimate" (A 4922), concludes that in 1966 there was sufficient vacant land in Albuquerque's northeast and southeast quadrants (42 and 6 square miles) to accommodate 365,000 people. But the evidence established that Avellanet's population projection was based upon an incorrect measure of vacant land in the northeast quadrant* and an unjustifiably high population density.

Mr. Yguado, utilizing Avellanet's boundaries for the northeast quadrant, calculated that the *entire* northeast

^{*} Cross-examination of Mr. Avellanet demonstrated his inability to find the 42 square miles (A 5020).

quadrant—both vacant and developed land—contained a total of 50 square miles (A 6993) with the undeveloped portion as of 1966 being far less than 42 square miles. And Avellanet's projection of a gross population density of 10.8 people per acre was simply historically unjustified.

The conclusion of the "1985 Land Use Plan" (Exhibit 60—A 9980-10060) that the Albuquerque study area of 212,000 acres was sufficient to accommodate a 1985 population of 825,000 people was similarly shown to have been erroneous. Mr. Carruthers agreed that the 212,000 acres included areas that were undevelopable (A 4624-34). Indeed, the major difference between Carruthers' testimony and Yguado's in this regard was that Carruthers made an on-the-witness-stand estimate of acreage within the study area which was undevelopable and Yguado arrived at excludable acreage by measurement and calculation.

Yguado's more precise figure of 110,434 acres of land unavailable for development within the 212,000 acre study area leaves 101,566 gross acres of developable land (A 7288, and see Exhibit KJ). Thus, utilizing Albuquerque's historical gross density of approximately 5 people per acre, Albuquerque had room for about 510,000 people—insufficient room for more than 300,000 of the expected 1985 population of 825,000.

Thus, even assuming infill,* it was not unreasonable to predict that growth in the amount of 300,000 persons would necessarily occur in the northwest.

^{*} Each of the prosecution experts testified that "leapfrogging" was a natural phenomenon of cities' growth and was occurring in Albuquerque (A 4352, A 4618-19; see also A 7192).

Taken in the light most favorable to the prosecution, there is evidence that opinions differed as to whether infill would prevent growth to the northwest. The existence and even knowledge of contrary opinions and predictions is not proof that appellants did not honestly disagree with those opinions and cannot support an inference that appellants knew their prediction and opinion of growth to the northwest was false or without basis in fact. Such an inference is impermissible absent near "conclusive" evidence that appellants' prediction was erroneous or evidence of a "universality" of opinion contradicting appellants' opinion. Cf. Leary v. United States, 395 U.S. 6, 36 (1969): Reilly v. Pinkus, 338 U.S. 269, 276 (1949); American School v. Mc-Annulty, 187 U.S. 94 (1902); United States v. Andreadis, 366 F.2d 423 (2d Cir. 1966), cert. denied, 385 U.S. 1001 (1967).

The evidence established that far from a "universality" of opinion contradicting appellants' view that the direction of Albuquerque's growth would be only to the northwest, there was a substantial body of respectable opinion supporting appellants' view (see *supra*, pp. 42-47).

To be sure, Albuquerque's population increase has fallen short of the many projections made in the 1960's. The economic recession slowed the growth rate But given the population increments as assumed in the 1960's, the evidence established there were two alternatives for absorbing the projected increase: higher density or growth to the northwest. The evidence has clearly shown the expectation of higher density to have been irrational; conversely, the evidence has completely substantiated the pre-

diction of northwest growth. Certainly criminal fraud is not made out because appellants failed to foresee the economic recession of the 1970's. The point is that appellants were justified in making their prediction of northwest growth, had ample basis for believing it to be accurate, and there is no evidence, direct or circumstantial, nor could there be, bringing home to appellants knowledge that their opinions were erreneous or without basis.

Even civil findings of fraud cannot be upheld on this evidence. The reasoning of the Eighth Circuit in Kelly Tire Service, Inc. v. Kelly-Springfield Tire Co., 338 F. 2d 248 (8th Cir. 1964), is applicable here. In that case a tire distributor sued a tire company for fraud based upon the tire company's erroneous forecast of business profits for the distributor made while negotiating a tire distributor-ship franchise. In affirming a judgment for the tire company, the Court wrote:

"At best, these projections [of business profits], however persuasive in shaping plaintiff's plans, were opinions subject to the uncontrollable economic influences of free enterprise and not fraudulent misrepresentations of past or existing facts on which plaintiff justifiably relied to its detriment." *Id.*, at 253.

And the Ninth Circuit, in *Marx* v. *Computer Science Corp.*, 507 F. 2d 485, 489-490 (9th Cir. 1974), a civil securities fraud case, wrote as follows:

"The . . . question is was the forecast [of future commercial success] an 'untrue' statement. Of course in hindsight it turned out to be wrong. But at least in the case of a prediction as to the future, that in itself does not make the statement untrue when made. . . .

'[A] reasoned and justified statement of opinion, one with a sound factual or historical basis, is not actionable.''' (Emphasis supplied.)

Here, appellants had a "sound factual" and "historical" basis for their opinion of growth to the northwest. The prosecution "infill" theory is not historically justified and certainly cannot support a finding beyond a reasonable doubt of falsity or that appellants did not honestly hold their opinion.

(b) The "northeast growth" theory

Nor is the evidence of Albuquerque's northeast growth legally sufficient to sustain a finding that appellants did not honestly believe that Albuquerque was predestined to grow only to the northwest. Indeed, the whole premise of the prediction of the necessity of northwest growth was that Albuquerque had certain natural and legal impediments to its growth except toward the northwest. Thus, their representation was that the *limit* on the amount of available and developable land in Albuquerque necessitated ultimate growth only to the northwest—not that there was no land available and developable except in the northwest.* There was testimony that currently only 2,500 noncontiguous acres of developable land remain in the northeast (A 6488, A 6956). And several customer witnesses

Moreover, the growth representations contained in this piece of promotional literature all speak in terms of the "future" and the direction in which Albuquerque is "predetermined" or "predestined" to grow.

^{*}The map of Albuquerque pictured on pages 8 and 9 of "This Is My Land" (see, e.g., Exhibit 384—A 10381-2) graphically portrays the growth barriers around the border of Albuquerque, the existing population concentration within Albuquerque and vacant land lying between the population concentration and the growth barriers.

testified that their understanding of AMREP's representation that Albuquerque was predestined to grow only to the northwest was that such growth would occur in the future when the limited available land elsewhere was used (A 6796-97, A 6900-01). No contrary customer testimony was adduced by the prosecution.

Yet the prosecution theory of falsity—i.e., that growth "only" to the northwest is proven false by evidence of past and present growth to the northeast—disregards the fair meaning intended to be conveyed to customers by appellants, substitutes the prosecution's own interpretation of what was meant, and relies on evidence that its own interpretation is false as proof of appellants' knowledge of falsity.

At best, appellants' representation about Albuquerque's future growth is ambiguous and subject to different interpretations. It is well-settled though that a conviction for making a false representation may not be based upon proof that the interpretation of the representation selected by the prosecution is false. Rather, in order to have sufficient evidence of knowing falsity there must be proof of the falsity of the meaning intended by appellants. United States v. Diogo, 320 F. 2d 898 (2d Cir. 1963); United States v. Steinhilber, 484 F. 2d 386 (8th Cir. 1973). See also, United States v. Lattimore, 127 F. Supp. 405, 408-409 (D.D.C. 1955), aff'd per curiam, 232 F. 2d 334 (D.C. Cir. 1955); United States v. Sarantos, 455 F. 2d 877, 881 (2d Cir. 1972).

In *United States* v. *Diogo*, *supra*, a prosecution for false statements to immigration authorities concerning marital status, this Court held that where a representation is sus-

ceptible to different interpretations the inquiry into falsity must be addressed to the meaning intended to be conveyed by the defendant and there can be no conviction based upon prosecution proof of the falsity of the interpretation it selects. This Court reversed the convictions, dismissed the indictments and wrote as follows:

"In construing these statements it is well established that we must look to the meaning intended by the appellants themselves, rather than to the interpretation of the statements which the immigration authorities did in fact make, or even to the interpretation which the authorities might reasonably have made.

"In prosecutions for . . . false representations the problem of interpreting ambiguous statements is frequently merged into the issue of mens rea. . . . If a defendant has not intended, by his statement, to assert the proposition which the Government has proved to be false, then he cannot ordinarily, of course, be said to have 'knowingly' uttered a false statement." Id., 320 F. 2d, at 906 n. 6. (Emphasis supplied.)

The prosecution's "northeast growth" theory in the instant case suffers from the same defect found fatal in Diogo: it interprets appellants' representation of opinion that Albuquerque was predestined to grow only to the northwest as asserting the proposition that no growth can presently occur in the northeast. As in Diogo, the problem is that "the proposition which the Government has proved to be false"—that no growth can presently occur in the northeast—was not proven by the prosecution to be the proposition intended to be asserted by appellants. Thus the "northeast growth" theory, not addressed to the meaning intended to be conveyed by appellants, cannot support

a finding beyond a reasonable doubt that appellants did not honestly believe in the meaning they intended to convey, to wit, that the only direction of Albuquerque's future growth was to the northwest.*

United States v. Steinhilber, supra, 484 F. 2d 386, is also in point. In that case the defendant was convicted of violating the Interstate Land Sales Full Disclosure Act in that he was found to have falsely represented that certain improvements in his land developments were then "being constructed" and "being built." The evidence established that although certain preliminary steps had been taken with respect to the improvements (plans had been drawn, parts had been ordered, site tests had been made), the actual construction had never taken place.

On appeal to the Eighth Circuit, Steinhilber contended that the phrases "being constructed" and "being built" were subject to two interpretations and that the prosecution proof of falsity—that no actual construction had occurred—failed to prove that the interpretation intended to be conveyed by Steinhilber—that the construction process had commenced and the improvements would be built in the future—was knowingly false. Relying on *United States* v.

^{*}In Diogo, supra, this Court stated that absent ambiguity "the question of what a defendant meant when he made his representation will normally be for the jury" (id., 320 F. 2d, at 907). This Court carefully pointed out however that where, as here, a representation is susceptible to different interpretations, "it is incumbent upon the Government to negative any reasonable interpretation that would make defendant's statement factually correct" (id.). The prosecution proof failed in this regard. It adduced no evidence that the interpretation it selected was the one appellants intended to convey and indeed, the very words used by appellants in context establish that the prosecution's interpretation was not intended.

Diogo, supra, the Eighth Circuit reversed the conviction, dismissed the indictment, and held that:

"... the meaning of the words in question was ambiguous and the Government ... [failed to meet its] burden of negating the claim that the defendant did not know the falsity of his statement at the time it was made..." Id., 484 F. 2d, at 390.

Again, the basic point is that where a representation is ambiguous, only proof of the falsity of the meaning in tended can support a finding of a knowing misrepresentation. In the instant case, the prosecution's evidence of "northeast growth" is not proof of the falsity of the meaning intended by appellants, indeed is consistent with that meaning, and, as in *Diogo* and *Steinhilber*, cannot, as a matter of law, support a finding that appellants' representation was knowingly false or not honestly believed.

2. Appellants Were Justified in Their Opinion that the Purchase of Lots in Rio Rancho Was a Good Investment and in any Event the Prosecution Failed to Prove that They Did Not Honestly Believe in Their Opinion.

The evidence established that Rio Rancho lies just outside of Albuquerque in an area which is rapidly expanding and where land values have increased dramatically over the past 15 years. Moreover the development of a growing community and the multimillion dollar investment of appellants and others provides ample basis for the belief that Rio Rancho lots will increase in value.

The land at Rio Rancho is not desert wasteland, but rather is highly developable land not plagued by many of the development problems associated with much of the land in or about Albuquerque (A 7167-70).

The Rio Rancho development is located to the northwest of Albuquerque, 4½ miles from its current municipal limits (see, e.g., Exhibit CK, p. 3—A 10809). As detailed above, the overwhelming evidence was that appellants were justified in their opinion that due to Albuquerque's natural and legal impediments to growth, the northwest was predestined to become the only area capable of absorbing the bulk of the expected influx by 1985 of a half-million people.

Logic and common sense strongly justify the opinion that developable land situated in what is believed to be the predestined path of growth of a major American city is a good investment. This is especially so in the case of Rio Rancho land where (a) the land is available with a 5 to 10 percent downpayment and a payout over five to ten years, and (b) running with the land sold for residential use is the absolute contractual right to a building lot serviced with utilities.

Moreover, it is fundamental that the evolution from raw land to residential, business and industrial uses is a process which necessarily increases the value of land. As Judge Brieant stated in dismissing a civil fraud complaint against Rio Rancho which was premised on the allegation of falsity in the representation that land in Rio Rancho was a good investment:

"Vacant land in arid New Mexico would not have increased in value appreciably had it not been developed." Davis v. Rio Rancho Estates, Inc., 401 F. Supp. 1045, 1050 (S.D.N.Y. 1975).

The most dramatic and persuasive proof that appellants honestly believed and continue to believe that land at Rio Rancho is a "good investment" is that they have been developing and promoting development at Rio Rancho since its inception in 1961.* Due to appellants' efforts and their own substantial financial investment, the population, number of houses, businesses, and industries and the extent of community facilities at Rio Rancho has increased year after year and is continuing to increase (despite the negative publicity generated by this case and the FTC proceeding) (see, e.g., A 3618-21).

The exchange mechanism—the development tool which was characterized by Avellanet as "a neat concept" (A 4872-73)—evidences appellants' intention to develop in an orderly and planned manner. And as the trial court recognized, AMREP has never defaulted on its obligation to provide a building lot to a land purchaser wishing to build (A 5633).**

^{*} Compare Lustiger v. United States, 386 F. 2d 132 (9th Cir.), cert. denied, 390 U.S. 951 (1968), wherein the accusation of fraud in representing the purchase of lots in "Lake Mead City" to be a "good investment" was supported by proof that up to a few months prior to indictment, there was no community of residents, no building improvement, and no plan to construct or provide housing or shopping facilities.

^{**} The prosecution argued that the exchange could not work in the long run because the land reserved for exchange purposes (16,000 acres as of April, 1975, see Exhibit 885—A 10664) was not equal in acreage to the amount of acreage sold. The argument is fallacious. First, the fact that land was reserved for future development instead of selling it is persuasive evidence of appellants' honest intention to develop. Second, AMREP will reacquire on the exchange (all halfacres) more land than it will give up (condominiums, some quarteracre lots, some half-acre lots). Thus, out of the 77,000 lots sold, many more than 32,000 half-acre lots would be reacquired, many of which would obviously adjoin existing developed areas. In this fashion, utilities will be extended to lots on an economic basis and contractually, when utilities have reached a lot, the exchange provision is inapplicable.

Due almost entirely to appellants' efforts, Rio Rancho consists of nearly 7,000 people, contains a modern shopping center, an office building, medical facilities, one of the best sewage trea ment plants in New Mexico, churches, schools, a theatre, country club, and an industrial park. Most significantly, in 1969 — AREP moved its own national administrative headque are sto Rio Rancho.

The prosecution produced no evidence that appellants did not honestly believe that lots in Rio Rancho were good investments. And, as with appellants' prediction of the necessity of northwest growth, the prosecution failed to adduce evidence of exactly what meaning appellants intended to convey by the phrase "good investment."

What a "good" investment means is susceptible only to a subjective determination. A good investment may be, and the evidence established it to be in this case, a purchase of a piece of land on which one can eventually build a home, or a purchase of a piece of land which can pass on to one's children. A good investment may be considered also as something which may go up in value over the years, and not necessarily have immediate liquidity.

Reliance by the prosecution on evidence that the land has not been readily or quickly marketable in Albuquerque*

^{*}The evidence is not persuasive that Rio Rancho land is not marketable in Albuquerque. The Multiple Listing Service—representing only a segment of Albuquerque's real estate salesmen (A 5281-83)—admittedly made little ¿ffort to sell listed Rio Rancho land (A 5239-42) generally listing land without terms. The Rocky Mountain Land Auction was conducted during publicity about this case and as Mr. Olguin, the broker in charge of the auction, conceded, the auction represented a distress sale situation (A 5165). Other evidence established that Rio Rancho land is marketable. The

is insufficient proof of falsity and cannot support an inference that appellants did not honestly believe Rio Rancho land was a good investment absent proof that appellants intended by their representation of "good investment" to convey the meaning that Rio Rancho lots were quickly and readily marketable at a profit. See, *United States v. Diogo, supra*, 320 F. 2d 898 (2d Cir. 1963); *United States v. Steinhilber*, supra, 484 F. 2d 386 (8th Cir. 1973).

Far from there being proof that appellants intended to represent that the lots were quickly and readily marketable, the evidence is clear that while certain salesmen made resale representations, no appellant authorized or knew of such representations and corporate policy was to prohibit such representations* (see, e.g., A 1088, A 3581, and Ex-

Multiple Listing Service sold 20 lots. Knowledgeable builders purchased lots at the auction for the "distress" prices which Mr. Olguin admitted were bargains (A 5168). Moreover, Mrs. Mellenbrook, a Rio Rancho resident, was able to sell a commercial lot at a profit of 100 percent by placing a wooden sign in the ground at the lot (A 6920-25). Mrs. Mellenbrook's friends, Mr. and Mrs. Gruetter, were able to do the same. The Schliebes, also Rio Rancho residents, sold a lot to the Lindemanns at a profit (A 6867-68). And of the prosecution witnesses, Mr. Mols sold a lot at a profit (A 3902-05) and Mrs. Bonavisa had an agreement to sell for a 50 percent profit which fell through due to the announcement of the indictment in this case (A 2790-91).

* Unauthorized representations by salesmen cannot support the prosecution's charge against appellants of criminal fraud. Barrett v. United States, 33 F. 2d 115, 116 (8th Cir. 1929); United States v. Corlin, 44 F. Supp. 940, 947-948 (S.D. *Cal. 1942).

In reversing a mail fraud conviction because there was insufficient evidence, the Eighth Circuit wrote in Barrett v. United States, supra,

as follows:

"Unless Barrett can in some legal way be connected with these statements, it seems clear that he cannot be held criminally responsible for every statement or promise made by a salesman

(footnote continued on next page)

hibit 1405). Indeed, since 1969, the New York Offering Statement, an integral part of the sales agreement, specifically disclaims quick liquidity and warns the purchasers that "resale for a profit may be difficult for a number of years..." (Exhibit CK—A 10809).

In Davis v. Rio Rancho Estates, supra, 401 F. Supp. 1045, after careful scrutiny of AMREP's sales literature, Judge Brieant held that the primary emphasis of the promotional materials was on the development of a residential community at Rio Rancho and not in promoting a financial investment. Judge Brieant wrote as follows:

"Although the two themes are interwoven throughout the brochures, defendants' promotional materials, fairly read, place more emphasis on development of a residential community than on purchase as an investment. It is inaccurate to say 'this development was being promoted as a pure investment, as opposed to a residential development which may, incidentally, be also a good investment." (Emphasis added.) Id., 401 F. Supp., at 1049-50.

Since the prosecution failed to establish that appellants intended to convey an impression of present liquidity by their good investment representation—the weight of the

who drew upon his imagination, instead of his authority, to close a contract."

And in language particularly apposite here, the Court in United States v. Corlin, supra, wrote:

[&]quot;If there were misrepresentations [as to resale], they were separate and individual misrepresentations of different persons employed at different times [citations omitted] each acting for himself, made without the authorization of the other defendants and in direct repudiation of the positive limitation of authority which the owner—defendant, for his own protection had caused to be inserted in the contract [citations omitted]."

evidence is that they did not—the prosecution's evidence of a present inability to market Rio Rancho lots in Albuquerque cannot support an inference that appellants did not honestly believe lots in Rio Rancho were a good investment for the long term or as a vehicle for becoming part of the developing residential community. As we quoted above, this Court's language in *Diogo*, supra, is directly apposite:

"If a defendant has not intended, by his statement, to assert the proposition which the Government has proved false, ordinarily of course, he cannot be said to have knowingly uttered a false statement." *Id.*, 320 F. 2d, at 905-6, n.6.

B. Insufficient Proof on Either Theory of Falsity Requires a New Trial.

We submit that the evidence failed as a matter of law to establish that appellants did not hold an honest belief in the accuracy of both their opinions (a) that Albuquerque's future growth would only occur to the northwest and (b) that the purchase of Rio Rancho lots was a good investment. Accordingly, we seek a reversal of the conviction and a dismissal of the indictment.

Alternatively, we submit that a failure of proof on either theory of falsity or a finding that either opinion amounts to puffing requires a new trial. See, e.g., Yates v. United States, supra, 354 U.S. 298, 311-312; Stromberg v. California, supra, 283 U.S. 359, 367-368; United States v. Natelli, supra, 527 F. 2d 311, 325. As this Court wrote in United States v. Natelli, supra, in reversing a false statement conviction and remanding for a new trial because of insufficient proof on one of the two specifications of falsity:

"A difficulty does arise, however, if it is found as a matter of law that there should have been a directed verdict for a defendant on one of the specifications for insufficiency of evidence. The verdict then becomes ambiguous, for the jury could have rejected the specification which the appellate court holds sufficiently proved, and have convicted only on the specification held to be insufficiently proved. In that event, there seems to be no alternative to remand for a new trial." *Id.*, 527 F. 2d, at 325.

POINT III

The Trial Court Erred in Admitting into Evidence Certain Testimony and Exhibits which Comprised the Most Inflammatory and Prejudicial Evidence in the Trial.

The court erroneously permitted the prosecution to admit into evidence and play for the jury two tape recordings of extraordinarily inflammatory content—purportedly sales training and dinner party presentation sessions—when there was no proof of their authenticity or their chain of custody. Additionally, on numerous occasions the court erroneously admitted documents into evidence and permitted the prosecution to adduce testimony which was blatant hearsay and which was not admissible under any of the "exceptions" to the hearsay rule. This erroneously admitted evidence was highly prejudicial and was heavily relied on by the prosecution, both during the trial and in summations and, indeed, was focused on by the jury during its deliberations. A new trial at which this evidence is excluded, is thus required.

A. Two Tape Recordings Were Improperly Admitted Because There Was No Proof of Their Authenticity and No Showing Made that They Were Not Tampered with Since Their Creation.

Two tape recordings were admitted into evidence over objection and played for the jury.* One tape (Exhibit 671—A 10547-64) purported to be a tape of a dinner party presentation, held in Buffalo on October 9, 1968, where the main speaker was Sid Hollander. The other tape (Exhibit 669—A 10525-46) purported to be a tape of a meeting of salesmen in Denver, Colorado conducted by Sid Hollander on October 1, 1968. The tape of the sales meeting was very heavily relied on by the prosecution and was extremely prejudicial to the defense. In it Sid Hollander is purporting to tell salesmen that their job is to get money out of people's pockets. "You're selling a plan, you're selling a dream, and more important, you're selling greed. Now, the easiest thing in the world to get out of any one individual in this entire country is greed" (Exhibit 669, p. 4-A 10528). In summation, Sid Hollander (who never appeared to testify) became the "star witness" for the prosecution. In its summation the prosecution characterized the sales meeting tape as "a very important piece of evidence," evidence that was "terribly probative of what really went on in this case" (A 7508). The prosecution dwelt on this tape throughout its summation (A 7508-11, A 7513, A 7520, A 7532-33, A 7538-39, A 7552, A 7555-56, A 7624, and A 7907-08), and ended by quoting from it as follows:

^{*} Exhibits 671A and B were admitted at A 897 and played for the jury at 1242-43. Exhibit 669A was admitted at A 1228 and played for the jury at A 1535. Exhibits 671 and 669 are the transcripts of the tapes which were given to the jury to read while the tapes were played. Four other tapes were admitted into evidence but not played for the jury, so we raise no issue as to them.

"These people who come to our party as versus you against the Green Bay Packers, we serve them with an organized offense against a disorganized defense. We could kill 'em. We could walk all over them, and we do—and we do." (A 7624)

The first request from the jury was to hear the Hollander tapes again (A 8021) and they were played a second time for the jury at its request (A 8026, A 8030-31).

These two tapes, neither witnessed nor ever heard by appellants, were admitted into evidence without any proof that they were recordings of an actual sales meeting or an actual dinner party or were maintained in a manner to assure that what was played in court was what actually occurred or that appellants had knowledge of them.* Thus, Howard Mandel testified that occasionally he asked managers to tape record dinner party presentations and send the tapes to him. From time to time he received tapes which he listened to (A 889-90). There was no procedure for logging what tapes were actually received (A 897). No one else reviewed the tapes (A 890). After he listened to the tapes Mandel put them in a credenza behind his desk (A 893). He did not know what happened to the tapes when he left AMREP in 1970 (A 897). He recognized only one voice on Exhibit 671—that of Sid Hollander (A 895). He was never shown Exhibit 669.

Peter Zaknich took over as Vice-President of Sales when Mandel left. He testified that he occasionally received tape

^{*} The court erroneously instructed the jury, however, that the individual appellants were to be held responsible for everything that was done by anyone, even if they did not know of it. Just before the charge on "apparent authority," the court told the jury that anyone who becomes a member of a scheme "is legally responsible for all that may be or has been done in furtherance of the criminal objective." (A 7972).

recordings and he thought that Mandel had received some before him (A 1214). He did not know when any particular tape was received in New York (A 1221-22). He could only testify to where and when the recordings were purportedly made by reading whatever was written on the reel or cassette or if the words spoken on the tape mentioned a date or place (A 1221-23), but he did not make any of the entries on the reels or cassettes, nor could be identify the handwriting in which any such entries were made (A 1224). When he took over Mandel's job, Mandel gave him a number of tapes, but he could not recall which specific tapes he received although he believed Exhibit 669 was among them (A 1224-26). He put the tapes he got from Mandel on a window sill and on a filing cabinet in his office and occasionally took some of them home to listen to them. Some tapes were returned to branch managers, others were erased and used again. He did not know when he took any particular tapes home but he had some tapes at his house when he left AMREP's employ in 1971 (A 1226-28). He later turned some of the tapes over to the government* (A 1226).

There was testimony that dinner party presentations followed a basic pattern set by New York. There was no such testimony about sales meetings. There was no evidence that there was a script for sales meetings or directions to the person conducting one to follow any set format or to say any particular thing to the salesmen. Exhibit 669 purported to be a tape of a sales meeting. No one who was present at that meeting testified. No one knows

^{*} Zaknich turned the tapes over to the FTC. On September 13, 1976 the prosecution in this case wrote to the FTC requesting that the tapes be turned over for use in the criminal trial.

who made the tape or whether it accurately records an actual sales meeting. No one could identify when or where the tape was made except by reading handwriting (the accuracy of which is unknown) on the cassette put on by some unidentified person. No one knows when the tape arrived in New York or how it got there. It sat in a credenza and on a file cabinet or a window sill for a few years in New York. No one knows whether it was removed from those places during that time or who had access to it. Some tapes were erased and reused. Some were sent out of New York. No one knows whether this tape was erased in whole or in part and rerecorded, or if it left New York. Ultimately the tape ended up in Zaknich's house in New Jersey. There was no testimony as to who had access to it there or whether it was tampered with. Zaknich sent the tape to the government. There was no testimony as to what happened to the tape when it was in the possession of the government.*

Judge Herland's opinion in *United States* v. *McKeever*, 169 F. Supp. 426 (S.D.N.Y. 1958), sets forth the basic conditions for the admission of a tape recording. In that case the court refused to admit a tape recording into evidence even though one of the participants in the conversation testified that he recognized the voices of the other two participants in the conversation and that he recalled speaking to one of the other participants at a time when he said

^{*} As with Exhibit 669, no one present at the dinner party purportedly recorded in Exhibit 671 testified, no one knows how or when the tape was made or sent to New York. No one knows what happened to that tape in New York—whether it was erased and reused or tampered with. All we know is that some years after he left AMREP, Zaknich found the tape in his house and gave it to the FTC.

some of the things that were recorded. The conditions for admissibility established in that case are:

- "(1) That the recording device was capable of taking the conversation now offered in evidence.
- (2) That the operator of the device was competent to operate the device.
 - (3) That the recording is authentic and correct.
- (4) That changes, additions or deletions have not been made in the recording.
- (5) That the recording has been preserved in a manner that is shown to the court.
 - (6) That the speakers are identified.
- (7) That the conversation elicited was made voluntarily and in good faith, without any kind of inducement." 169 F. Supp., at 430.

None of Judge Herland's conditions for admissibility were met by the prosecution in this case in respect to the tapes it introduced.

We have found no case where the absence of proof on the making and subsequent chain of custody of a tape recording admitted into evidence even approaches the utter lack of proof in this case. In many cases where a tape recording has been admitted into evidence the government made the tape and retained custody of it until the trial. For example, in *United States* v. *Bonnano*, 487 F. 2d 654 (2d Cir. 1973), a Secret Service Agent testified as to the mechanics of the making of a recording by the government of a consent telephone call between an informant and the defendant. In virtually all cases where a tape recording is played for the jury one of the persons whose voice is on

the tape testifies, identifies the voices, the time and place that the tape was made and states that the tape is an accurate recording of the conversation that took place, thus negating the possibility that the tape was tampered with between the recording and the trial. See, e.g., United States v. McMillan, 508 F. 2d 101 (8th Cir. 1974), cert. denied, 421 U.S. 916 (1975); United States v. Alston, 460 F. 2d 48 (5th Cir.), cert. denied, 409 U.S. 871 (1972); Monroe v. United States, 234 F. 2d 49 (D.C. Cir.), cert. denied, 352 U.S. 873 (1956); McKeeman v. Commercial Credit Corp., 320 F. Supp. 938 (D. Neb. 1976). In United States v. Knohl, 379 F. 2d 427, 440 (2d Cir.), cert. denied, 389 U.S. 973 (1967), this Court emphasized the burden on the government to prove that tape recordings have not been tampered with in these words:

"We are not unmindful, however, that tape recordings are susceptible to alteration and that they often have a persuasive, sometimes a dramatic, impact on a jury. It is therefore incumbent on the Government to produce clear and convincing evidence of authenticity and accuracy as a foundation for the admission of such recordings." *Id.*, 379 F. 2d, at 440.

Again, the prosecution here failed to produce any evidence of authenticity and accuracy, let alone "clear and convincing evidence."

In United States v. Starks, 515 F. 2d 112 (3d Cir. 1975), a defendant's conviction was reversed because the prosecution failed to prove the chain of custody of a tape recording. In that case a prosecution witness made a recording under F.B.I. supervision and immediately turned the tape over to a Special Agent who initialed it. The prosecution witness testified that the tape was an accurate recording

of the conversation. But the prosecution was "unable to account for the whereabouts of the tape" from the day after it was made until the day of the trial. 515 F. 2d, at 123. The conviction was, therefore, reversed.

In this case the prosecution's evidence did not even approach the degree of proof held insufficient in Starks. Not only was there no proof as to the chain of custody of the tapes after they were sent to the government, there was no proof of their chain of custody prior to that time. No one present at the making of the tapes testified. Only by assuming that the tapes were accurate and had not been tampered with, could the date and location of the conversation be ascertained. Only the voice of Sid Hollander could be identified. Because sales meetings followed no script or set pattern, even the general accuracy of that tape could not be inferred from evidence of a common pattern. In short, there was no evidence before the trial court to warrant its having admitted these tapes into evidence as accurate and unaltered versions of what happened eight years before the Because these tapes played such a crucial and dramatic role in the prosecution's case, the convictions should be reversed.

B. Nine Documents Authored by Persons Who Were Neither Called as Witnesses Nor Employed by any of the Corporations Were Erroneously Admitted over Hearsay Objections.

The trial court erroneously admitted nine letters in evidence over appellants' hearsay objections. Five of these letters* were written by Albuquerque realtors in

^{*} Exhibit 129a—A 10145 admitted at A 5502. Exhibit 129e—A 10149 admitted at A 5502. Exhibit 129h—A 10151 admitted at A 5503, Exhibit 129j—A 10153 admitted at A 5494, and Exhibit 1309a—A 10799 admitted at A 1757.

response to letters written to them by purchaser-witnesses called by the prosecution. The prosecution sought to admit these letters to bolster its contention that there was no resale market in Albuquerque for lots at Rio Rancho. For example, in Exhibit 129e, an Albuquerque realtor wrote to a witness "The local market for this property is very limited and a great deal of land is being offered." And in Exhibit 129a, another realtor wrote "I am sorry to advise that land such as you have purchased has little or no value in the Albuquerque market." The prosecution advanced no theory of limited admissibility for these letters-and the trial court did not limit their admisssibility by instruction-- and there was no basis for admitting them other than for the truth of what was contained in them. In desperation to blunt the damaging effect of these letters, when Exhibits 129a, 129e, and 129h were read, the defense asked the court to instruct the jury as to their hearsay nature and that the defense could not cross-examine them (A 5504-05). The court gave the jury no such limiting instruction and in its summation, the prosecution read Exhibit 129a again to the jury and argued from it that there was no resale market in Albuquerque for land at Rio Rancho (A 7579-80, A 7910).

These letters were extremely prejudicial to the defense. The prosecution called two Albuquerque real estate men (Ron Williams and Peter Olguin) to testify about the resale of Rio Rancho land. Both were extensively cross-examined. Williams testified about 20 resales of Rio Rancho land which had taken place (A 5251-53). Olguin's only connection to Rio Rancho land was that he was the broker of record in a distress auction of Rio Rancho land which

took place a few months after the FTC complaint was made public (A 5164-65). The letters from other realtors could not be cross-examined. By these letters the prosecution sought to persuade the jury that there was a universality of opinion—that all Albuquerque realtors knew that Rio Rancho land was unsaleable.

Two exhibits* were written by relatives of a purchaser-witness called by the prosecution. Both of them recount attempts to sell their land, and are replete with sarcasm that was not lost on the jury. For example, Exhibit 107b says "Roth Realty who is more than eager to make a sale has no buyers for such a good investment..." (Emphasis in original). The obvious purpose of introducing those letters was to put before the jury, without cross-examination, the authors' opinion that Rio Rancho land was an extremely poor investment that could not be resold. Again, the court did not admit these letters for a limited purpose and did not give a limiting instruction to the jury.

Exhibits 976 and 983 were two letters from one Rodney Katzenberg purporting to set forth his understanding of an agreement between Harmon O'Donnell and Henninger and Rio Rancho Estates.** Exhibit 976 was addressed to Herman Oberman and the court ruled that this made it admissible against all of the defendants.† No foundation whatsoever was laid for the admission of these two letters.

^{*} Exhibits 107b—A 10124 and 107i—A 10130 admitted at A 1653-56.

^{**} Exhibit 976—A 10684 was admitted at A 4793. Exhibit 983—A 10692 was admitted at A 4795.

[†] Throughout the trial the court misapplied the coconspirators' exception to the hearsay evidence rule to impute knowledge from one

⁽footnote continued on next page)

The nine exhibits thus erroneously admitted do not fall within any of the recognized exceptions to the hearsay evidence rule. Their admission thus requires reversal of the convictions. United States v. Sherfey, 384 F.2d 786 (6th Cir. 1967). They were not admissible under the catch-all exception, subsection 24 of Rule 803, Fed. R. Evid., because they are not more probative "than any other evidence which the proponent can procure through reasonable efforts." The authors of the two most damaging letters, Malcolm Lincoln and James Bradley, were on the prosecution's witness list, as were the authors of Exhibits 129h, 129j, 976 and 983, but none of these people was called as a witness by the government, and no showing was made of their unavailability.

C. Hearsay Statements of Non-Testifying Employees of the Corporations Were Erroneously Admitted for Their Truth Against the Individual Appellants.

Highly prejudicial statements of corporate employees, both oral and contained in documents, were admitted into evidence over hearsay objections against the individual

defendant to another. For example, in pretrial hearings the defense argued in support of the motion to sever the individuals from the corporations, that many documents were being admitted solely to show notice to the corporations and that the jury would have great difficulty in ignoring those documents when deciding the fate of the individuals. The court said:

[&]quot;You are getting into an area of conspiracy here. The knowledge of one is the knowledge of all." Tr. Nov. 1, 1976, at p. 32. And at A 679 the court said he did not see the difference between the attribution of a declaration from one co-schemer to another and the attribution of knowledge of a document from one co-schemer to another. In admitting Exhibit 976, the court announced in the presence of the jury that the fact that it was addressed to Herman Oberman made it admissible against everyone (A 4793).

appellants.* Oral statements by non-testifying corporate employees regarding the key issues in this case, *i.e.*, the anticipated future growth of Rio Rancho and the direction of growth of Albuquerque, were admitted into evidence, saturated the record, and were repeatedly mentioned to the jury in summation by the prosecution.

The trial court admitted these hearsay statements against each of the individual appellants on the theory that a non-testifying corporate employee's statement would be admissible against the individuals if the employee had a job title which seemed to suggest a degree of responsibility (e.g., A 706-07).

The rulings, we submit, were violative of the Sixth Amendment's Confrontation Clause as well as the Federal Rules of Evidence.

The prosecution theory of admissibility was seemingly based on the notion that an employee's statement, admissible against the corporation (Fed. R. Evid., Rule 801[d][2][D]), becomes the statenest of the corporation and hence admissible as a co-conspirator's declaration against all

^{*} Prior to the trial the individual: moved for a severance from the corporate appellants on the ground that most of the documentary evidence (the prosecution premarked over 1,700 documents as exhibits) consisted of statements of corporate employees not admissible against the individuals, but which the jury would be unable to keep segregated in its deliberations (A 9527-41). The prosecution argued that statements of corporate employees were admissible against the corporations, and, if *prima facie* proof was introduced establishing a scheme involving the corporations and the individuals, they would be admissible also against the individuals as co-conspirator's statements. The trial court denied the motion for a severance and ruled that if there were sufficient evidence to tie an individual to the alleged scheme, all the documentary evidence would be admissible against him (e.g., A 332-33, A 341-45, A 706-07).

those found to have conspired with the corporation (Fed. R. Evid., Rule 801[d][2][E]). In effect conceding that no one hearsay exception justifies the admission of a corporate employee's hearsay against the individual appellants, the prosecution theory strings together a series of hearsay exceptions and seeks to use the corporate entity as a kind of magic transformer to change inadmissible hearsay into what was claimed by it to be a co-conspirator's declaration.

An out-of-court statement by an employee of a corporation to a third party is admissible against the corporation for the truth of the statement if made "concerning a matter within the scope of his agency or employment, [and] made during the existence of the relationship" (Fed. R. Evid., Rule 801[d][2][D]). Such statements, admissible for their truth against the corporation as a matter of agency law are clearly not admissible for that purpose against individual corporate officers simply because they happen to be employees of the same principal. Cf. Cory Mann George Corp. v. Old, 23 F.2d 803, 810 (4th Cir. 1928).*

Nor are employees' statements to third parties admissible against the individual officers as co-conspirators' declarations. With the exception of appellants and Messrs. Monaco and Geller, no corporate employee was designated as or proved a co-conspirator (co-schemer).

The fallacy in the prosecution denominating these hearsay statements as co-conspirators' declarations stems from

^{*} In Cory Mann George Corp. v. Old, supra, the Fourth Circuit, in a closely related context, wrote as follows:

[&]quot;Notice to the employees of the corporation was notice to the corporation but not to its officers and directors." *Id.*, 23 F. 2d, at 810.

a thoroughly erroneous reading of Fed. R. Evid., Rule 801 [d][2][D]. That Rule does not make an employee's statement the statement of the corporation—it only permits that statement to be admitted in evidence against the corporation.

Put another way, the imputation of an employee's statement to a corporation does not metamorphosize the corporation into a living entity capable itself of forming the requisite intent to conspire. Cf. United States v. Carroll, 144 F. Supp. 939, 941-42 (S.D.N.Y. 1956). To permit the prosecution to impute one non-conspirator employee's statement to another employee merely by the device of charging the corporation as a co-conspirator would frustrate the hearsay rules.

As the Ninth Circuit wrote in summarily rejecting the theory that statements of employees of a corporation are co-conspirator declarations:

"... it cannot be seriously urged that naming a corporate defendant a co-conspirator makes every employee of said corporation a co-conspirator, subject to the rules of evidence which related to a conspiracy." Flintkote Co. v. Lysfjord, 246 F.2d 368, 384, n. 19 (9th Cir.), cert. denied, 355 U.S. 835 (1957).*

^{*} In opposition to appellants' severance motion in the trial court, the prosecution cited three civil antitrust cases (Schine Chain Theatres, Inc. v. United States, 334 U.S. 110 [1948]; United States v. United States Gypsum Co., 333 U.S. 364 [1948]; and United States v. Imperial Chemical Industries, Ltd., 100 F. Supp. 504 [S.D.N.Y. 1951]) in support of its theory of admissibility.

The government's reliance on *United States* v. *United States Gypsum Co., supra*, was particularly misplaced. There, the Supreme Court made it clear that it was dealing with "the declarations and acts of the various *members*" (emphasis supplied) of the conspiracy. Here, there is no claim that corporate employees (other than the

Particularly, in a case such as this where the entire conduct of a large corporation is charged to be criminal, such a boot-strapping approach would permit the statements of thousands of employees who are not co-conspirators to be admitted into evidence against individual defendants, when none of the alleged individual co-conspirators have ever heard of the people whose statements are attributed to them. Such an approach would permit the prosecution, as it did in this case, to put many hearsay statements before the jury and completely deprive the individual defendants of their constitutional right to confront and cross-examine the witnesses against them.

Particularly prejudicial to appellants was the admission of Avellanet's hearsay testimony as to statements made by Herman Oberman and Bob Walsh. Each statement was of crucial significance to the central issues in this case and each statement was urged by the prosecutor in summation as direct evidence of the individual appellants' guilt.

Thus, Avellanet was permitted to testify that Oberman told him that the operating premise of Rio Rancho was that only 5% of the buyers of Rio Rancho land would ever

appellants, Leonard Geller, and Daniel Monaco) are members of a conspiracy.

In addition, the admissibility of hearsay in a civil case does not raise constitutional problems. See, California v. Green, 399 U.S. 149 (1970). As Judge Wyzanski wrote in United States v. United Shoe Machinery Corp., 89 F. Supp. 349, 355 (D. Mass. 1950):

"[I]n a civil anti-trust suit in which the Government can secure against a defendant at most an injunction and order without monetary damages, . . . the trial judge is not required to exclude every type of hearsay evidence which would be excluded in other types of cases. While the Supreme Court seems never to have stated that doctrine in those words, the doctrine is implied in what that Court has actually done. . . ." (citation omitted).

relocate to Rio Rancho. Avellanet's testimony was as follows:

"Specifically, he [Oberman] cited that perhaps twentyfive percent of the lot buyers think about coming to Rio Rancho, but invariably something happens, they may die, they may no longer be interested or what have you, and that as a working assumption for the operations 95 percent of the buyers do not come and this was used by myself in figuring what might be the likely future population of the Rio Rancho Estates development pertaining to the national sales market." A 4820)

This statement was initially admitted because Oberman was indicted as a co-schemer. After Oberman was acquitted at the close of the prosecution's case, the defense moved to strike it (A 6245-46). The court rejected the defense motion and ruled the statement admissible against the individual appellants in spite of Oberman's effectively having been found not to have been a co-schemer:

"I have no doubt about it. If the jury finds from all the evidence that it was done with the authority of the corporation, it could be binding on the individual defendants." (A 6245)

Based on this ruling, the prosecution hammered home in summation that Oberman's statement proved that the individual defendants did not intend to develop Rio Rancho (e.g., A 7547-48, A 7617-19). At most, the statement tends to show that *Oberman* thought the land would not be entirely developed. There is not one shred of evidence in the record that the individual appellants espoused this view or even knew that Oberman had made the statement. Finally,

there is no conceivable way this statement furthered the alleged scheme to sell Rio Rancho land.

Avellanet also testified over objection that Bob Walsh, an independent contractor hired by Rio Rancho to do surveying work, told him that Albuquerque was primarily growing to the east and northeast, and that the growth on the westside was limited:

"Q. Mr. Avellanet, in the conversations that you had with Mr. Walsh, did he describe that extent of growth on the west side of Albuquerque? A. To the best of my recollection, he did.

Q. And how did he describe it? A. Well, as very limited. He stated there were a few developments and he mentioned them.

Q. In addition to describing the growth on the west side as limited, did Mr. Walsh describe the direction of growth of Albuquerque? A. Yes.

Q. And what did he tell you? A. He indicated it was primarily east and northeast." (A 4814)

The prosecution argued in summation that Walsh spoke to Avellanet on behalf of Rio Rancho and if he knew the direction of Albuquerque's growth, the individual appellants must also have known it (A 7613-14).

Even if the court could find that Walsh was an agent of Rio Rancho Estates, Inc., his statements to Avellanet about the direction of Albuquerque's growth could not have been made in furtherance of an alleged scheme to sell land of which he was ignorant. Furthermore, the argument that the individual appellants must necessarily have "known"

or believed what an Albuquerque surveyor thought to be the truth is patently absurd.

In addition, a large number of documents authored by corporate employees who did not testify were admitted over objection against the individual appellants on the theory that what was admissible against the corporations was admissible against the individuals. For example, in Exhibit 893A, Marianne Newman, head of customer relations, says that the only area available for exchange is Corrales Heights. Thus, under the trial court's admissibility rulings, her statement could have been considered by the jury just as though an individual appellant had made it:

Exhibit 872 (A 10663) was also prejudicial, and particularly so since the prosecution reread it to the jury in summation (A 7569-70). In this memo to the files Marianne Newman recounts that a customer called in and said that when he had bought land he was told that the land was almost sold out, that there would be no more land available, and that he would be able to resell his property within a year's time but that the purchase of additional land had prevented his being able to resell. Under the judge's ruling this double hearsay was admitted for its truth against the individual appellants.

Finally, Exhibit 657 (A 10521) contains many statements by Jim Colgrove about how few Albuquerque people move to Rio Rancho. This exhibit was admitted against all appellants (A 5245, A 5313-15, A 5588-89) for the truth of the statements contained therein and was referred to by the prosecution in its summation as proof that Rio Rancho did not have an impact on the Albuquerque market (A 7619). In

addition to being blatant hearsay, there is no conceivable way this memo could be said to have furthered the alleged scheme to sell land, even if it were admissible against the individual appellants by transforming the agent's statement into a co-conspirator's statement.

In sum, the prosecution "witnesses" who were most damaging to the defense were those people who were never called to the witness stand—Sid Hellander, Herman Oberman, Bob Walsh and Marianne Newman among others. Appellants were continually called upon to defend against the acts and statements of witnesses they could not cross-examine. The extent to which the prosecution relied on absent "witnesses" to convict requires a reversal of the convictions.

POINT IV

The Convictions on Numerous Specific Counts Cannot Stand because the Evidence Seen and Heard by the Jury Failed to Establish an Essential Element of the Crimes Charged.

An essential element of mail fraud (18 U.S.C. §1341)* is the use of the mails in furtherance of a scheme to defraud.

^{*}Title 18, United States Code, §1341 provides in pertinent part: "Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises . . . for the purpose of executing such scheme or artifice . . . places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service . . . or knowingly causes to be delivered by mail according to the direction thereon . . . any such matter or thing, shall be fined not more than \$1,000 or imprisoned not more than five years, or both."

The Interstate Land Sales Act (15 U.S.C. §1703[a])* requires, as an essential element, the use of instruments of communication in interstate commerce in selling lots in a subdivision to defraud purchasers.

Four television commercials and a script of a radio commercial, the only evidence from which a jury could determine on the five interstate land sales counts (counts 71, 72, 73, 75 and 79) whether instruments of communication were used in selling lots, were admitted in evidence in the absence of the jury (A 5992-6006, A 6656-57). The only evidence of a "mailing" for count 67 was similarly introduced outside the presence of the jury (A 5584-85). None of this evidence was ever shown to the jury and the jury did not call for it during its deliberations.

Additionally, there was insufficient evidence on thirteen mail fraud counts that there was a mailing on or about the dates alleged in the counts (counts 7, 10, 21, 22, 23, 28, 29, 35, 36, 44, 61, 64 and 67) in furtherance of the alleged scheme to defraud. Accordingly, the convictions on the interstate land sales counts and on thirteen of the mail fraud counts must be reversed.

^{*} Title 15, United States Code, §1703(a) provides in pertinent part:

[&]quot;It shall be unlawful for any developer or agent, directly or indirectly, to make use of any means . . . of . . . communication in interstate commerce—

⁽²⁾ in selling or offering to sell . . . any lot in a subdivision—(A) to employ any device, scheme, or artifice to defraud.

⁽A) to employ any device, scheme, or artifice to defraud, or

⁽C) to engage in any transaction, practice or course of business which operates or would operate as a fraud or deceit upon a purchaser."

A. The Interstate Land Sales Counts and Count 67

To sustain the judgment of conviction on these counts there must have been before the jury enough evidence "to establish a case from which the jury may infer guilt beyond a reasonable doubt." United States v. Lefkowitz, 284 F.2d 310, 315 (2d Cir. 1960). Evidence which the jury never saw or heard obviously could not have been considered by it. Without this evidence, the jury could not have concluded appellants' guilt on these counts beyond a reasonable doubt.

Directly apposite is *United States* v. *Alexander*, 271 F. 2d 140 (8th Cir. 1959). In that obscenity case, the defendant contended on appeal that the evidence was insufficient since the allegedly obscene books were never read to the jury in open court, and, accordingly, could not have been properly considered by it.

Although the Eighth Circuit affirmed the conviction, the Court carefully pointed out that the books were taken into the jury room during deliberations.

In holding that the evidence of obscenity was sufficient since the jury could have "reach[ed] as complete an understanding of the contents of the books through their own reading of such books in the jury room as they could have obtained through the reading of the books to them in open court" (id., at 145), the Court stressed that, however obtained, it was mandatory for the jury to have knowledge of the contents of the books. The Court wrote as follows:

"It was, of course, necessary for the jury to have knowledge of the contents of the books in order to properly arrive at their verdict. Whether such knowledge was obtained by their own reading of the books or by having the books read to them is a matter of no importance." (Id., at 144)

In this case the evidence required to be considered on essential elements of the crimes alleged did not reach the jury either in open court or in the jury room. Thus, in no respect was it possible for the jury here "to have knowl-Gee of the contents of the . . . [commercials or the mailing] in order to properly arrive at their verdict." In order to convict on counts 71, 72, 73, 75 and 79 it was necessary for the jury to find beyond a reasonable doubt that the developer made use of means of communication in interstate commerce in selling lots in a subdivision to defraud purchasers. Although there can be no dispute that television and radio commercials are "means of communication in interstate commerce", it was nonetheless mandatory for the jury to consider the actual commercials introduced into evidence to see if they were used in selling tots in a subdivision to defraud purchasers.

As the court itself stated during the trial:

"The mere fact that somebody advertised for Rio Rancho may have nothing to do with the sale of land. It may have been the sale of a swimming pool or membership in a golf course, I don't know.

You want the inference drawn that these went to the sale of land, the way they sold land at dinner presentations, et cetera." (A 5996)

Without actually having seen or considered the commercials, the jury could not have found that they "went to the sale of land, the way they sold land at dinner presentations." There was no other evidence in the case from

which the jury could have made that determination. Inasmuch as the jury's verdicts on counts 71, 72, 73, 75 and 79 were based on no evidence whatever of this essential element of these offenses, the judgments of conviction on these counts must be reversed.

Similarly on count 67 no evidence of mailing ever reached the jury. Mrs. Hampe never testified to a mailing. The only evidence of "mailing" was introduced in the absence of the jury (A 5583-84) and was never read or seen by it. The jury could thus not possibly have concluded on the evidence before it that a payment was caused to be mailed by the appellants on July 3, 1975 in furtherance of the alleged scheme to defraud.

B. The Thirteen Mail Fraud Counts

To warrant conviction under the mail traud statute, there must be proof of a mailing to execute a fraudulent scheme to or from the district of trial at or near the time alleged. In this case there was no evidence before the jury that thirteen of the twenty "mailings" alleged had been sent through the United States mails (i.e., with respect to counts 7, 10, 21, 22, 23, 28, 29, 35, 36, 44, 61, 64 and 67). Additionally, on count 36 the "mailing" was an unsolicited letter from the purchaser to Rio Rancho a number of years after the purchaser had completed his payments for the land. There is thus no proof that appellants caused that letter to be sent or that it was in execution of the scheme alleged.

Perhaps the most striking example of the prosecution's failure to prove a mailing involves Count 67, a payment allegedly mailed by Mr. and Mrs. Hampe on July 3, 1975. Mrs. Hampe was the first witness for the prosecution. When she was on the witness stand, the prosecution failed to elicit any testimony from her concerning the method by which she and her husband made their payments for the land they had purchased at Rio Rancho. At the end of its case outside the presence of the jury the prosecution introduced Exhibit 167a (A 10216) into evidence (A 5583-84). That Exhibit is a computerized statement of account prepared by Rio Rancho. Under the column "Date of Last Payment" the numbers 07/93/75 appear. From this document (which the jury never saw), the prosecution would have the jury infer that Mr. and Mrs. Hampe mailed a payment on or about July 3, 1975. The statement of account may prove receipt, but the law is clear that proof of receipt, standing alone, is insufficient to preve a mailing.

In United States v. Robinson, 545 F.2d 301 (2d Cir. 1976), a defendant's conviction of seven counts of possessing checks stolen from the mails and relat deponts was reversed by this Court. In that case the government proved that similar checks were always received by the addressees by mail, that the checks were issued by offices in Alabama, Illinois and Pennsylvania, that they did not arrive at the payees' addresses, that each was endorsed by someone other than the payee and that they were all deposited in bank accounts of 'he same New York business. This Court held that such evidence was insufficient to prove that the checks had been mailed. In footnote 4, 545 F.2d at 304, this Court distinguished a Fifth Circuit case and said that while proof of receipt has some probative value as to whether an item was mailed, proof of receipt standing alone is insufficient proof of a "mailing."

This Court's ruling in Robinson, supra, is especially applicable to the instant case where there was graphic proof that the receipt of payment by Rio Rancho did not mean that the payment was mailed. For example, after the direct and most of the cross-examination of Morris Gusowsky (count 15), the court pointed out to the prosecution that it had failed to prove a "mailing." The prosecution replied:

"I found out in talking to this witness, although he has a mailing and there is a company record that says there is a mailing, he has told me that after he moved to Rio Rancho he would walk the mailing over—he would walk his payment over to the office." (A 3974-75)

Thus, the "mailing" alleged in the indictment for count 10,* the "mailing" for which there is a company record of receipt, is a "mailing" Gusowsky delivered himself to the office.

There was also absolutely no evidence of a mailing for counts 28 (Davis) and 44 (Brindle). Davis merely identified his signature on two checks made out to Rio Rancho (A 2566), and Brindle merely stated that the handwriting on a check made out to Rio Rancho was that of his wife (A 2532).

Although a number of count witnesses testified that they "made" payments or "sent" payments, they failed to state

^{*}The trial court gave appellants the choice of agreeing to an amendment of the indictment to allege a different "mailing" or of having an additional "count" witness called. Appellants agreed to the amendment but even the new "mailing" was not proven by the prosecution. See text, p. 89, infra.

that they had "mailed" payments. The jury may not be permitted to infer that documents which were "sent" were sent by mail. See, United States v. Dondich, 506 F.2d 1009 (9th Cir. 1974), where the court expressly refused to allow such an inference to be drawn; see also, Mackett v. United States, 90 F.2d 462 (7th Cir. 1937). Particularly since the record in this case makes it clear that "mailings" could be "walked over" to the office as Mr. Gusowsky did, and since there is no evidence that Chemical Bank (the collection escrow agent) refused to accept payments delivered by messengers or private delivery services, the jury could not conclude that all payments "made" or "sent" were carried by the United States mail.

Since the jury may not be permitted to draw the inference that documents were mailed, absent evidence to that effect, the convictions on the following counts must be reversed: count 61 (Fox: No documents were offered to prove this count; Mr. Fox merely testified that he makes payments each month to the bank and gets a receipt [A 2867]); count 64 (Finnerty: Mr. Finnerty identified a cancelled check made out to Rio Rancho and testified that he sent the check in an envelope with a printed address on it [A 2662]); count 7 (Finnen: Mr. Finnen, when asked how payments were made, testified as follows, "They are made, I believe, to a bank in New York by envelopes provided by the corporation" [A 1642]); count 22 (Morden: Mr. Morden simply identified checks which "I sent for the property" [A 5680]); count 29 (Sporzynski: Mr. Sporzynski, when asked how he made payments, said "By check sent to Chemical Bank in New York. I believe the name is Chemical Bank" [A 5479]); count 21 (Gray: Mr. Gray testified that he had coupons and made his payments by personal

checks to the bank [A 5809-10]); and count 36 (Kaufmann: Mr. Kaufmann testified he wrote a letter to Rio Rancho [A 5323]). No further testimony, no postmarked envelopes, nor any other direct evidence of mailing was offered to prove the mailings for these counts. Only cancelled checks, a letter and statements of account were offered in evidence. As noted above, these types of documents are insufficient to permit a jury to infer that a mailing has been made.

Neither may the jury be permitted to infer a "mailing" for counts 23 (Henry) and 35 (Mohammed). Mrs. Henry identified the check which the prosecution contends was the mailing as having been made out by her husband. She testified that it was her practice to send (not "mail") checks she drew to New York; she did not testify to her husband's practice (A 469-71). Mrs. Mohammed never answered the question "Did you mail this check to anyone?" (A 2614). Thus, the record is devoid of any evidence establishing her method of payment.

After amending the indictment to allege a new "mailing" for count 10, the prosecution failed to put sufficient evidence before the jury to prove the new "mailing" alleged. Mr. Gusowsky was shown Exhibit 110L (A 10132) and asked if it was an envelope to the Chemical Bank with his return address on it. He said yes. The Exhibit was never shown to the jury and the only part of it which was read was the stamp on it marked "Received May 10, 1971" (A 4025). There was thus no proof whatsoever which the jury saw or heard to the effect that the envelope was in fact mailed.

The jury may not infer that because some purchasers mailed their payments, others must also have used the

United States mail. To begin with, the record is clear that not all purchasers did use the mails. Though evidence that a given purchaser always used the mails may be some circumstantial proof that on a certain date that purchaser used the mails, the custom and habit of one purchaser cannot be used as evidence of what a different purchaser did. It is only the custom and habit of the individual sender that is pertinent. United States v. Toliver, 541 F. 2d 958, 966 (2d Cir. 1976). As this Court has recently held, "[I]ndividual checks, which were the subject of separate counts of the indictment, cannot be lumped together to support the inference" that they were all sent by mail. United States v. Robinson, supra, 545 F. 2d, at 304. "Moreover, the inference suggested by the government is impermissible. It violates the principle that the jury must consider [a] defendant's guilt or innocence as to each count of the indictment separately." Id., at 304.

Finally, as to count 36 (Kaufmann), in addition to failing to prove that the letter was mailed, the prosecution failed to prove that any alleged co-schemer caused the mailing of the letter or that the letter was in execution of a "scheme." The count "mailing" was a letter which Mr. Kaufmann wrote, unsolicited, to Rio Rancho three years after he had completed his payments and been deeded his land. His letter was not in response to anything done by appellants, nor did it assist appellants in selling land or collecting payments therefor.*

Because there was no proof before the jury that on given days radio and television commercials were used to

^{*} Even before Mr. Kaufmann testified, the defense raised the objection that this letter could in no way be deemed to be in furtherance of the alleged scheme (A 4976-83).

sell lots in a subdivision to defraud purchasers, the conviction on Counts 71, 72, 73, 75 and 79 must be reversed. Additionally, because insufficient evidence was adduced that the United States mails were used in furtherance of the scheme alleged in connection with thirteen of the mail fraud counts, the convictions on counts 7, 10, 21, 22, 23, 28, 29, 35, 36, 44, 61, 64 and 67 must also be reversed.

POINT V

Appellants Howard W. Friedman, Henry L. Hoffman, AMREP Corporation, RIO RANCHO ESTATES, Incorporated, and ATC REALTY Corporation, Join in the Arguments Asserted by the other Appellants in This Case Insofar as They Are Applicable.

CONCLUSION

The Judgments of Conviction Should be Reversed and the Indictment Dismissed.

Dated: New York, New York May 5, 1977

Respectfully submitted,

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